5-18-2012

Hehr v. City of McCall Respondent's Brief Dckt. 39535

IN THE SUPREME COURT OF THE STATE OF IDAHO

RICHARD HEHR and GREYSTONE VILLAGE, LLC, Plaintiffs/Appellants, Cross-Respondents v. CITY OF McCALL, Defendant/Respondent, Cross-Appellant	Supreme Court Docket No. 39535-2012 Dist. Court No. CV-2010-276C

RESPONDENT/CROSS-APPELLANT'S BRIEF

Appeal from the District Court of the Fourth Judicial District of
The State of Idaho, in and for the County of Valley,
Honorable Michael R. McLaughlin, Presiding

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STATEMENT OF THE CASE

This is Defendant/Respondent/Cross-Appellant City of McCall's ("McCall" or the "City") response brief. It responds to *Appellants' Brief* filed by Plaintiffs/Appellants/Cross-Respondents Richard Hehr and Greystone Village, LLC (collectively, "Greystone"). It also serves as the City's opening brief on cross-appeal.

I. NATURE OF THE CASE

This is a regulatory takings case involving a *Development Agreement* pursuant to which Greystone conveyed nine undeveloped lots (Phase III of its Greystone Village Project) to the City for use as affordable housing. *Affidavit of Michelle Groenevelt* ("*Groenevelt Aff.*"), Exh. R.[1] The proposed conveyance was included by Greystone in its application for final plat (subdivision) and final plan (planned unit development or "PUD"). R. Vol. II, pp. 354-57. "The deed-restricted lots for Phase III will be deeded to the City of McCall, please review development agreement [for] further details." *Id.* at 356. The *Development Agreement* was approved by the City and made a condition of approval of Greystone's final plat and final plan. *Groenevelt Aff.*, Exh. O, P, & Q.

While Greystone's development applications were pending, the City of McCall enacted two ordinances (Nos. 819 and 820) that required developers to provide affordable housing[2] as a condition of certain development approvals. *Groenevelt Aff.*, Exh. F & G. Both were declared unconstitutional in a separate proceeding. *Mountain Central Bd. of Realtors, Inc. v. City of McCall*, Case No. CV 2006-490-C (Idaho, Fourth Judicial Dist., Feb. 19, 2008) (*Groenevelt Aff.*,

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[1] As reflected in the Clerk's *Certificate of Exhibits* (R. Vol. IV, p. 648), the *Affidavit of Michelle Groenevelt* was lodged with the Court as an exhibit instead of being included in the Clerk's Record.

[2] The terms "community housing," "affordable housing," and "workforce housing" are interchangeable. They all refer to deed-restricted housing that is sold at below-market prices to qualifying low-to-moderate income members of the community workforce.

Exh. U). Neither ordinance applied to Greystone, however. Greystone's project was not subject to Ordinance 819, because the ordinance was enacted subsequent to Greystone's development applications. Greystone was not "grandfathered" from Ordinance 820, which provided that fees were to be assessed at the time of application for a building permit. However, Greystone never paid any such fees. Pursuant to the *Development Agreement*, the City agreed to waive any such fees for the Greystone Project because the value of the nine lots provided to the City far exceeded the value of any fees that would have been charged.

During the course of the entitlement process, Greystone never challenged the *Development Agreement* or complained that it was being forced into it. Indeed, the developers, including Mr. Hehr, stood for pictures at the groundbreaking of the affordable housing and accepted the praise of the City and the community. It was only years later, after the departure of Mr. Benad, that the remaining developer[3] decided to demand reimbursement for Greystone's contribution based on the theory that the whole arrangement amounted to an illegal tax.

But even if it had been involuntary, and even if it were a taking (also known as inverse condemnation), Greystone brought its claims in the wrong type of action and waited too long. For a host of reasons discussed below, the suit is barred. And for good reason. Before the suit was filed, the City used the donated property to build affordable housing units. Those homes have long since been conveyed to eligible members of the workforce. That bell cannot be un-rung. This is why the Legislature and the courts have established deadlines and procedures to provide certainty and avoid clawbacks like the one sought here by Greystone.

II. COURSE OF PROCEEDINGS

The City does not see a need to supplement the discussion provided by Greystone.

[3] "Plaintiff Richard Hehr is the sole remaining member of Plaintiff Greystone Village . . . ." R. Vol. II, p. 194 (Plaintiff's discovery responses).

III. STATEMENT OF THE FACTS

For the convenience of the Court, the key events and documents, and their location in the record, are set out in a timeline attached to this brief as Exhibit A.

Greystone submitted its development application on January 12, 2005. In a hearing on May 3, 2005 (exactly one year before the *Development Agreement* was signed), the Chairman of the City's Planning and Zoning Commission ("P&Z") inquired about whether Greystone was considering providing affordable housing even though it was not required by law to do so. The minutes recite: "Chairman Bailey asked – 'without City law behind me' – is that [affordable housing] possible to consider between now and the final plat? It's more constructive if it's a voluntary project." *Groenevelt Aff.*, Exh. B. Greystone did just that. These are the key events:

- On March 20, 2006, Greystone submitted an application for final plat and final plan[4] approval which contained this statement: "The deed-restricted lots for Phase III will be deeded to the City of McCall, please review development agreement [for] further details." R. Vol. II, p. 356. The referenced development agreement was not in the record as of that date. The agreement first appears in the record on April 20, 2006 (see below).
- On April 4, 2006, the P&Z recommended approval of the final plat and final plan development applications. The minutes describe the developers' proposal to provide affordable housing: "Dean Briggs on behalf of Steve Benad [Greystone developer] said they are planning to build 9 affordable housing lots instead of 6 lots as originally planned. He advises the houses will be deed restricted." *Groenevelt Aff.*, Exh. I, at 2.
- The Findings and Conclusions issued the same day contain no explicit reference to affordable housing, but did recommend approval conditioned on execution of a

[4] The final plat was the last step in the subdivision permit process. The final plan was the last step in securing a permit for a PUD.

development agreement—a reference to the one providing for affordable housing. *Groenevelt Aff.*, Exh. J & K (see proposed Conditions 19, 1-19, and 2-1 of each). Greystone made no objection and sought no administrative review or amendment.

- On April 7, 2006, three days after the hearing, Greystone's lawyer wrote to City staff confirming Greystone's intention to convey the nine lots from its subdivision for affordable housing. "I need to make sure that we have satisfied the city's requirement for providing affordable housing. Greystone Village intends to deed to the City of McCall nine (9) affordable housing lots along McCall Avenue with the understanding that the value of those lots will be credited against the affordable housing impact fees/costs." *Groenevelt Aff*, Exh. L. This reference to "the city's requirements for providing affordable housing" should be understood in context. There was no affordable housing requirement applicable to Greystone at that time. Rather, the statement was made in the context of the *Development Agreement* then being negotiated. As noted below, on April 20, 2006, the City agreed to a condition waiving any fees under Ordinance 820.
- On April 10, 2006, Greystone obtained an appraisal of the nine lots (known as Greystone Village No. 3), fixing their value at $130,000 per lot. *Groenevelt Aff.,* Exh. M. This appraisal was obtained in accordance with the *Development Agreement*, which called for an appraisal of the lots.
- On April 20, 2006, City staff faxed to Greystone a revised version of the key language in the *Development Agreement*: "The appraised market value of the lots shall provide Greystone Village with an offset against community housing fees for the Greystone Village project. The applicant will also receive the associated benefits of the community housing contribution in the building permit allocation process." *Groenevelt Aff.*, Exh. N.

- On April 27, 2006, the City approved Greystone's development applications (the final plat, SUB-05-4, and the final plan, PUD-05-2). The City also approved the *Development Agreement*. The minutes recite: "Roger Millar, Deputy City Manager, introduced this agenda bill, stating that the developer will deed nine lots to the City for affordable housing. Steve Benad introduced himself as the developer for Greystone Village, and explained to Council that he wanted to get some community housing built and available as soon as possible. He urged the Council to consider allowing modular homes to be built in this development." *Groenevelt Aff.*, Exh. O, p. 3.
- On April 27, 2006, the same day as the hearing, the City issued two sets of Findings and Conclusions which included this statement confirming the voluntary nature of the transaction: "While the applicant is not required to provide a Community Housing Plan, the applicant has agreed to deed nine single family residential lots that constitute Phase 3 of the project to the City of McCall to provide Community Housing." *Groenevelt Aff.*, Exh. P & Q, Finding No. 16, p. 8. "The City of McCall accepts the nine single family residential deeded lots from the applicant and the applicant will receive the associated benefits of the community housing contribution in the building permit allocation process." *Groenevelt Aff.*, Exh. P & Q, Conclusion 3, p. 9.
- On May 3, 2006, Greystone signed the *Development Agreement*. The contract memorialized the voluntary nature of the transaction:

> WHEREAS, the said approvals contain various conditions on which the City and Greystone Village have reached agreement and which agreement the City and Greystone Village desire to memorialize.
>
> . . .
>
> 7.1 Greystone Village shall deed to the City of McCall, nine (9) affordable housing lots located along McCall Avenue and shown on the plat for Greystone Village as Phase III. The legal

> description of these lots is set forth in Exhibit 'D' which is attached and incorporated herein.
>
> 7.2 The appraised market value of the lots shall provide Greystone Village with an offset against community housing fees for the Greystone Village project. The applicant will also receive the associated benefits of the community housing contribution in the building permit allocation process.

Groenevelt Aff., Exh. R, pp. 1, 3. This language is identical to the language in the draft sent to Greystone on April 20, 2006. *Groenevelt Aff.*, Exh. N.

- The *Development Agreement* also contained provisions reiterating Greystone's obligation to construct the infrastructure for the approved development, including sewer connections (Article III), fire hydrants (Article IV), street lighting (5.1.1), street signs (5.1.2), driveways (5.1.3), landscaping (5.1.6), and obligated Greystone to construct the development in accordance with the approved construction plans (5.2).

All of these events occurred more than four years (and much more than 28 days or 180 days) before Greystone filed its *Complaint* on July 15, 2010. R. Vol. I, pp. 1-5. The only events that occurred within four years of the *Complaint* were the conveyance of the warranty deed to the City on July 31, 2006 (*Groenevelt Aff.*, Exh. S) and Greystone's inquiry on July 26, 2007 as to whether it remained obligated to make improvements on the donated lots (R. Vol. II, p. 385).

ADDITIONAL ISSUES PRESENTED ON APPEAL

In addition to the issues identified in *Appellants' Brief*, The City identifies these issues:

1. Was judicial review under LLUPA Greystone's exclusive remedy?
2. Do equitable principles demand dismissal of Greystone's lawsuit?
3. Should attorney fees be awarded to McCall?

ATTORNEY FEES ON APPEAL

The City seeks reversal of the denial of attorney fees by the District Court. It also seeks attorney fees on this appeal. The basis of the City's claims is set out in section VIII at page 45.

ARGUMENT

I. GREYSTONE'S CLAIMS ARE BARRED BY ITS FAILURE TO SEEK JUDICIAL REVIEW.

The Local Land Use Planning Act ("LLUPA") authorizes judicial review of certain permitting decisions identified in Idaho Code §§ 67-6519 and 67-6521(1).[5] This includes final plats and PUDs. *Giltner Dairy*, 145 Idaho at 633, 181 P.3d at 1241. The City's approval of Greystone's final plat and final plan on April 27, 2006 contained an express requirement (based on Greystone's own application) that it convey property to the City for affordable housing. Plainly then, these were final agency actions that were reviewable under LLUPA.

This Court has held repeatedly that when judicial review is available under LLUPA, it is the exclusive procedure for challenging the local government's action. In *Bone v. City of Lewiston,* 107 Idaho 844, 693 P.2d 1046 (1984), the Court admonished the plaintiff for trying to "bypass" the statute declaring that LLUPA "is the exclusive source of appeal for adverse zoning actions." *Bone*, 107 Idaho at 848, 693 P.2d at 1050. The Court reached the same result in *Curtis v. City of Ketchum*, 111 Idaho 27,32-33, 720 P.2d 210, 215-16 (1986) and *Regan v. Kootenai County*, 140 Idaho 721, 725-26, 100 P.3d 615, 619-20 (2004). *See also*, *Cobbley v. City of Challis*, 143 Idaho 130, 133-34, 139 P.3d 732, 735-36 (2006) (applying the same principle in the context of judicial review of a road validation).

Based upon these authorities from Idaho and elsewhere,[6] the rule is indisputable: If a

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[5] References in this brief will be made to the language of the statute in effect at the relevant time, that is, prior to its amendment in 2010, 2010 Idaho Sess. Laws ch. 175. However, it makes no difference. Neither the 2010 amendment nor the Court's decision in *Giltner Dairy v. Jerome County*, 145 Idaho 630, 633, 181 P.3d 1238, 1241 (2008) changed the availability of judicial review for final plats and PUDs. Both were reviewable before, and both remain reviewable today under LLUPA.

[6] Idaho law, of course, is controlling. But it is interesting to note that Idaho law is consistent with the decisions reached by the high courts of other states, which have rejected end-runs around judicial review of allegedly illegal impact fees. For example, in *Sold, Inc. v. Town of Gorham*, 868 A.2d 172 (Maine 2005), Maine's high court considered a declaratory judgment action brought by developers who had paid impact fees under an allegedly unconstitutional and illegal ordinance. The court held that the action was barred by the plaintiffs' failure to challenge the city's approval of their subdivisions. "When the time to file an appeal expired, the conditional

procedure for judicial review of a decision has been created by the Legislature, then that procedure is the exclusive means to challenge that decision (absent exceptions not applicable here[7]), and a court does not have subject matter jurisdiction over a collateral attack. *Regan*, 140 Idaho at 726, 100 P.3d at 620. Because judicial review under LLUPA was Greystone's exclusive means of challenging the City's actions, the District Court lacked subject matter jurisdiction over Greystone's civil action.

II. GREYSTONE'S STATE LAW CLAIMS ARE BARRED BY GREYSTONE'S FAILURE TO TIMELY FILE A NOTICE OF CLAIM.

Even if this Court determines that Greystone is allowed to collaterally attack the permitting actions in a civil action, section 6-906 of the Idaho Tort Claims Act, Idaho Code §§ 6-901 to 6-929, coupled with Idaho Code § 50-219, requires Greystone to provide notice to the City within 180 days of when its claims arose or reasonably should have been discovered.

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approvals, including the impact fee requirements, became final, and were not subject to challenge." *Sold Inc.* at 176 (citation omitted).

Similarly, in *James v. County of Kitsap*, 115 P.3d 286 (Wash. 2005), the Washington Supreme Court addressed claims from developers who sought refunds of allegedly illegal impact fees. In *James*, the county appealed from a summary judgment that awarded the developers more than three million dollars in refunds arguing, inter alia, that the developers' claims were barred by their failure to challenge the fees within 21 days of when the permits were issued, as required under Washington's Land Use Petition Act ("LUPA"). The court ruled that the district court had no jurisdiction over the developer's collateral attack: "The Developers here were provided, by statute, with several avenues to challenge the legality of the impact fees imposed by the County and comply with the procedural requirements under chapter 82.02 RCW and LUPA. . . . However, rather than complying with either of these procedures provided by statute, the Developers waited almost three years before challenging the legality of the impact fees imposed by the County. The Developers have not complied with the procedures provided under LUPA and RCW 82.02.070(4) and are barred under LUPA from challenging the legality of the fees imposed." *James* at 293-94. The *James* court went on to describe the public policy considerations that supported limiting challenges to land use decisions to the procedures available under the statute: "As we stated in [*Chelan County v. Nykreim*, 52 P.3d 1 (Wash. 2002)], this court has long recognized the strong public policy evidenced in LUPA, supporting administrative finality in land use decisions. The purpose and policy of the law in establishing definite time limits is to allow property owners to proceed with assurance in developing their property. Additionally, and particularly with respect to impact fees, the purpose and policy of chapter 82.02 RCW in correlation with the procedural requirements of LUPA ensure that local jurisdictions have timely notice of potential impact fee challenges. Without notice of these challenges, local jurisdictions would be less able to plan and fund construction of necessary public facilities. Absent enforcement of the requirements under chapter 82.02 RCW and LUPA, local jurisdictions would alternatively be faced with delaying necessary capacity improvements until the three-year statute of limitations for challenging impact fees had run." *James* at 294 (citation supplied).

While the Idaho Tort Claims Act ("ITCA") applies only to claims sounding in tort, Idaho Code § 50-219 expands the requirement in the case of cities, making all state law[8] damage claims (not just torts) subject to the 180-day rule in Idaho Code § 6-906.[9]

Greystone concedes the applicability of the ITCA and the fact that it did not file a claim within 180 days of when the lots were conveyed and the improvements constructed, much less when it first became aware of that the conveyance would be required. *Appellants' Brief* at 31.

Greystone's sole argument is that the City's enactment of Resolution 08-11 on April 24, 2008 restarted the 180-day clock for Greystone. Resolution 08-11authorized refunds to entities that actually paid community housing fees under Ordinance 820. *Groenevelt Aff.*, Exh. W. Resolution 09-10, adopted on November 4, 2009, set a final deadline of December 31, 2009 for eligible entities to request a refund of fees under Resolution 08-11. *Id.*, Exh. X.

Greystone initially framed this argument under the rubric of quasi-estoppel. R. Vol. II, pp. 252-55. The District Court made fast work of that argument, relying on *City of Eagle v. Idaho Dep't of Water Resources*, 150 Idaho 449, 247 P.3d 1037 (2011), among other authorities. R. Vol. II, p. 363-65. On appeal, Greystone has abandoned its quasi-estoppel argument.

All that remains is Greystone's argument that "the City's passage of Resolution 08-11 created a new claim against the City." *Appellants' Brief* at 31. Greystone contends that the *Refund Request Form* it submitted in response to the resolution constituted a notice of this new claim under the ITCA, and that it was timely presented to the City because it was submitted prior

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[7] Collateral attacks (that is, civil actions outside of LLUPA) are sometimes permissible in the case of a facial challenge to an ordinance. *McCuskey v. Canyon County* ("*McCuskey I*"), 123 Idaho 657, 660, 851 P.2d 953, 956 (1993). This is not a facial challenge. This case involved a one-off arrangement worked out with Greystone.

[8] The City acknowledges that the ITCA claim requirement does not apply to federal claims.

[9] *Sweitzer v. Dean*, 118 Idaho 568, 571-73, 798 P.2d 27, 30-32 (1990); *Scott Beckstead Real Estate Co. v. City of Preston*, 147 Idaho 852, 216 P.3d 141 (2009). This includes takings claims under state law. *BHA Investments, Inc. v. City of Boise* ("*BHA II*"), 141 Idaho 168, 174-76, 108 P.3d 315, 321-23 (2004).

to December 31, 2009, which was the deadline for refund requests for fees paid under Ordinance 820. *Appellants' Brief* at 31.

Greystone presents this argument unencumbered by any legal theory or precedent. Apparently, Greystone believes that a cause of action can accrue more than once. This idea is difficult to reconcile with the cases discussed below establishing that the cause of action accrues when the plaintiff becomes fully aware of the interference with his or her property. One wonders how a plaintiff could become fully aware of an obligation to convey its property to the government, and then some time later, become fully aware of it all over again. In short, whatever claims Greystone had existed since 2006 and did not become "new" when the City enacted Resolution 08-11. Greystone's *ipse dixit* is legally, factually, and logically flawed.

Idaho Code § 6-906 unambiguously requires a claim to be filed "within one hundred eighty (180) days from the date the claim arose or reasonably should have been discovered, whichever is later." Greystone's refund request of November 12, 2009 simply reiterates what it said in its *Complaint* and *First Amended Complaint*:[10] "Nine single family lots had to be given to the City of McCall in order to get approval and entitlements for Greystone Village. This was not voluntary on my part." *Groenevelt Aff.*, Exh. Y. Greystone did not suddenly discover this when the City enacted Resolution 08-11. The City's adoption of Resolution 08-11 had no effect whatsoever on the application of the plain language of 6-906 to Greystone's claims. Nowhere in the *First Amended Complaint* does Greystone allege a claim for damages that arose from the adoption of Resolution 08-11 independent of the requirement to convey the lots.

Greystone's contention that Resolution 08-11 somehow created a new claim can also be

[10] For example, Greystone alleges that it "was required to enter into a Development Agreement as a condition of approval of its land use application, which said agreement contractually bound Greystone to deed lots to the City." *First Amended Complaint*, R. Vol. I, p. 8, ¶ 12. "The requirement that Greystone enter into a Development Agreement, which provided that it must deed real property to the City for community housing, is

understood as saying that Greystone did not realize it had a claim until the City offered to refund certain community housing fees. However, this type of argument has been flatly rejected by this Court. In *BHA Investments, Inc. v. City of Boise* ("*BHA II*"), 141 Idaho 168, 108 P.3d 315 (2004), plaintiffs contended that they should be excused from this very notice requirement "because they could not reasonably have known they had a claim until January 30, 2003, when we issued our opinion in *BHA I*." *BHA II*, 141 Idaho at 174, 108 P.3d at 321. The Court stated: "That opinion did not create a cause of action where none previously existed. The phrase 'reasonably should have been discovered' refers to knowledge of the facts upon which the claim is based, not knowledge of the applicable legal theory upon which a claim could be based." *Id.* Thus, Greystone's tardiness is not excused by the fact that it did not yet have the benefit of Judge Neville's decision in *Mountain Central* or the City's resolution providing for refunds of certain community housing fees that had been paid by other developers.

Even if this Court were to find that the adoption of Resolution 08-11 created new claims for eligible entities and reset the clock for noticing those claims, this accomplishes nothing for Greystone because the resolution, by its unambiguous terms, does not apply to Greystone. The resolution provided: "Mandatory Community Housing Fees paid under Ordinance 820 between February 23, 2006 and September 27, 2006 are eligible for the refund." *Groenevelt Aff.*, Exh. W.

The problem is that Greystone never paid <u>any</u> fees under Ordinance 820. Instead, its fees were waived per the *Development Agreement*. In recognition of the lots Greystone provided for affordable housing, worth over a million dollars, the City agreed not to turn around and charge Greystone affordable housing fees under Ordinance 820. This is reflected in the 12 building permits that Greystone pulled before the Ordinance was repealed. Each of the Building Permit

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illegal and is violative of state and federal law." *Id.*, ¶ 18.

Application Forms displayed at R. Vol. II, pp. 234-37, 239-40, 242-43, 245-46, 248-49 show a diagonal line through the box labeled Community Housing Fee. The amount of the waiver under Ordinance No. 820 was not calculated or tracked because it was a drop in the bucket compared to the value of the lots that Greystone had contributed. The simple point is that, because the fees were waived, there was nothing paid and nothing to reimburse. Accordingly, Resolution 08-11 does not apply to Greystone and could not have created a new claim.

Resolution 08-11 was a generous action on behalf of the City. The City probably had defenses at least to some who had paid fees under Ordinance 820. But, pursuant to the ordinance, the money was sitting in a trust account, and the City felt the proper thing to do was to return that money. In Greystone's case, there was no money sitting in a trust account, and there was nothing to return. Assuredly, Greystone had made a far more generous contribution—by orders of magnitude—than the thousands of dollars it would have been charged for community housing under Ordinance No. 820. But Greystone made that contribution on its own motion, as reflected in its own development applications and the *Development Agreement* it signed. The City spent public money building affordable housing on those lots, the homes have been conveyed, and that action cannot be undone. The City worded the resolution to make clear to whom it applied and to whom it did not. Resolution 08-11 does not apply to Greystone. Thus, no "new claim" arose.

In this respect, Greystone's position is similar to the argument rejected by the Court in *Scott Beckstead Real Estate Co. v. City of Preston*, 147 Idaho 852, 216 P.3d 141 (2009). In that case, the plaintiff sought reimbursement from the city for the cost of installing a water line. When the plaintiff learned that the city was charging third parties for connections to the water line built at the plaintiff's expense, it sought reimbursement under two theories. Its unjust

enrichment claim was tossed out because it was tardy under the ITCA. The plaintiff's other theory was that it was entitled to reimbursement under a city ordinance that allowed developers to pay the city for construction of water lines and be reimbursed later when third parties paid hook-up fees.

This Court rejected that argument for the same reason it should reject Greystone's argument: the ordinance allowed certain other people to obtain reimbursements, but did not apply to the plaintiff. *Scott Beckstead*, 147 Idaho at 855, 216 P.3d at 144. We have the same situation here. Resolution 08-11 does not apply to Greystone because Greystone did not pay any fees to the City under Ordinance 820. Resolution 08-11 did not address the waivers of fees associated with the conveyance of property pursuant to development agreements. Instead, whatever claims Greystone has trace back to its permits and the *Development Agreement.* Accordingly, the notice of claim was untimely, and Greystone's state law claims were properly dismissed pursuant to sections 6-908 and 50-219.[11]

III. GREYSTONE'S STATE CLAIMS ARE UNTIMELY UNDER IDAHO'S FOUR-YEAR STATUTE OF LIMITATIONS.

A. Greystone's cause of action accrued and the statute began to run when it became apparent that Greystone would be required to contribute affordable housing.

Greystone's state law claims are subject to the Idaho's catch-all four-year statute of limitations, Idaho Code § 5-224.[12] Every relevant action in this case occurred more than four years before Greystone's *Complaint* was filed, save two: (1) the actual conveyance of the

[11] If, despite all this, the Court were to find that the resolution did create a new claim for Greystone that was properly pled and timely noticed under the ITCA, such a claim would be limited to the couple thousand dollars or so of fees that were waived for each of the 12 building permits that Greystone pulled before Ordinance No. 820 was repealed. The resolution has no bearing on (or ability to revive) Greystone's claim with respect to the conveyance of the nine lots or its provision of road and utility improvements.

[12] Greystone concedes that the five-year statute of limitations applicable to contracts does not apply. *Plaintiffs' Memorandum in Opposition to Defendant's Motion for Summary Judgment* at 10, R. Vol. II, p. 259.

property on July 31, 2006 and (2) Greystone's inquiry on July 26, 2007 as to whether it would be required to perform prior commitments for road and utility improvements. But those actions merely reflected commitments that had been put into place earlier.

Despite Greystone's assertions, the conveyance of property to the government is not a prerequisite to a taking claim. To the contrary, a claim arises as soon as it becomes known that the government is requiring an unlawful and uncompensated conveyance of a person's property. In the words of this Court, "The time of taking occurs, and hence the cause of action accrues, as of the time that the full extent of the plaintiff's loss of use and enjoyment of the property becomes apparent." *McCuskey v. Canyon County Comm'rs* ("*McCuskey II*"), 128 Idaho 213, 217, 912 P.2d 100, 104 (1996). McCuskey had contended that the statute did not begin to run until the Court had ruled the county's zoning action illegal, because only then did he know the full extent of damages for the temporary taking. The Court rejected this argument, explaining that the lack of quantification of the loss is not an excuse for delay in filing the lawsuit:

> Moreover, it is well settled that uncertainty as to the amount of damages cannot bar recovery so long as the underlying cause of action is determined. Besides, although McCuskey may not have known the full extent of his damages at the time the stop-work order was issued, he would have known with certainty what they were once a taking had been finally adjudicated.

McCuskey II, 128 Idaho at 218, 912 P.2d at 105 (citation omitted). Thus, the Court's earlier quoted reference to knowing "the full extent of the plaintiff's loss" should be understood to mean that the clock begins to run when interference with plaintiff's property is sufficiently apparent that a cause of action has arisen, regardless of whether the full extent of damages is then known.

The law on this is consistent and settled. In a case decided the same year, this Court explained that the statute begins to run "when the impairment was of such a degree and kind that substantial interference with Wadsworth's property interest became apparent." *Wadsworth v.*

Idaho Department of Transportation, 128 Idaho 439, 443, 915 P.2d 1, 5 (1996). In *Rueth v. State*, 103 Idaho 74, 79, 644 P.2d 1333, 1338 (1982), the Idaho Supreme Court held that the statute ran on the date of a meeting between parties at which time there was "recognition of the severity of the problem." In another case, the Court explained, "The actual date of taking, although not readily susceptible to exact determination, is to be fixed at the point in time at which the impairment, of such a degree and kind as to constitute a substantial interference with plaintiffs' property interest, became apparent." *Tibbs v. City of Sandpoint*, 100 Idaho 667, 671, 603 P.2d 1001, 1005 (1979) (inverse condemnation based on airport expansion).

In *Harris v. State, ex rel. Kempthorne*, 147 Idaho 401, 405, 210 P.3d 86, 90 (2009), this Court ruled that the statute of limitations on inverse condemnation ran from the day the plaintiffs were compelled to enter into a mineral lease with the state, not the time they made payments to the state under the lease.

> We affirm the district court's determination that the full extent of the Harrises' loss of use and enjoyment of the property became apparent when they entered into the Mineral Lease. At that point in time, the impairment constituted a substantial interference with their property interest because they signed an agreement promising to pay royalties and rents on the sand and gravel. Therefore, the Harrises are barred from recovering under their inverse condemnation claim by I.C. § 5-224.

Harris, 147 Idaho at 405, 210 P.3d at 90.

This is a direct analogy to the situation here. The City's requirement of the conveyance was imposed on Greystone on April 27, 2006, and the *Development Agreement* itself was signed on May 3, 2006. Either of these is the equivalent of the lease agreement in *Harris*. Under *Harris*, it matters not when the payment was made or the land conveyed.

Indeed, Greystone was "fully aware" that the workforce housing conveyance would be required on each of the events detailed in the bullet points in the Statement of the Facts—

beginning with Greystone's filing of the final plat and final plan applications March 20, 2006 to its signing of the *Development Agreement* on May 3, 2006. Most notably, it was "fully aware" of the obligation on April 27, 2006 when the City approved the *Development Agreement* and issued Findings and Conclusions confirming the agreement to convey the nine lots. The decision was appealable on that day under LLUPA. *Ipso facto*, Greystone had a cause of action. Even if it were allowed to bring a civil action outside of LLUPA, that civil action would have been ripe at that moment, or earlier.

This seems simple, but Greystone struggles to understand. It argues: "Here, this Court should answer the question: could Greystone have brought an inverse condemnation claim and been paid just compensation at the time it signed the Development Agreement?" *Appellants' Brief* at 16. The answer is simple. For the reasons explained above, it is obvious that a lawsuit would have been ripe at or before the time the *Development Agreement* was signed. Whether this would have included the payment of compensation depends, of course, on how quickly the relief was granted. If the relief came before the conveyance occurred, then damages would have been unnecessary. In any event, whether the relief was prospective or for damages, the cause of action had accrued.

There is no support for Greystone's contention that one can never initiate a takings claim until the plaintiff suffers the physical loss of "the use and enjoyment of property." *Appellants' Brief* at 16. LLUPA and the incorporated judicial review provisions of the Idaho Administrative Procedure Act say otherwise. They authorize judicial review based on constitutional deprivation the moment the requirement becomes final. Where no permit is involved or in other fact settings where LLUPA review is not available or required (such as a facial challenge), a civil action for declaratory or injunctive relief may be brought, just as occurred in the *Mountain Central* case

that invalidated Ordinances 819 and 820. *Groenevelt Aff.*, Exh. U. That case, brought by Greystone's counsel, certainly was not dependent on any particular physical loss of property.

Finally, Greystone's observation that it might have changed its mind and decided not to complete the project after obtaining injunctive or declaratory relief is true but irrelevant. Plaintiffs in any lawsuit can change their minds after obtaining relief.[13] That possibility does not make their litigation unripe or deny them a cause of action.

B. The Court should not depart from firmly-established precedent and apply the "project completion rule" to regulatory takings.

This Court has established a different rule for determining the date of accrual in certain physical takings cases involving construction.[14] This is known as the "project completion rule," as set forth in *C & G, Inc. v. Canyon Highway Dist. No. 4*, 139 Idaho 140, 143-44, 75 P.3d 194, 197-98 (2003). There the Court established a rule more generous to plaintiffs subjected to physical takings involving construction projects. As the Court noted, it found doing so particularly appropriate in that case because of misrepresentations by the highway district regarding the existence of an easement. But there is another reason that the project completion rule makes sense for these sorts of physical takings. In physical takings cases involving construction on a plaintiff's property the debate is not over whether the government's action should be stopped. After all, governments can take property, and, by the time of a physical taking, they already have. Instead, the focus of the debate is over how much the government should pay for the property taken. Accordingly, a project completion rule makes perfect sense, because only then is it clear how much property was taken and how any remaining property is

[13] For instance, the Harrises could have chosen not to remove any sand and gravel from their property. *Harris*, 147 Idaho 401, 210 P.3d 86. Likewise, the developers represented by the trade group in *Mountain Central* could have decided not to build in McCall.

[14] See footnote 33 at page 43 regarding the difference between physical and regulatory takings.

affected.

Regulatory takings (including exactions like the one alleged here) are different. These are typically much tougher cases involving a determination of whether the government's action was justified or not. Often, the relief is prospective. As this Court has noted, if there is a need to determine damages, that can always be done during the course of the litigation. *McCuskey II*, 128 Idaho at 218, 912 P.2d at 105. Knowing the full extent of the damages at the time the action is filed is not necessary, particularly where there is a chance to declare the uncompensated taking unlawful before the property is taken or at a point in time when the action can be readily undone. In regulatory takings cases, knowledge and certainty that property can and will be taken without compensation is the key, not the extent of damages. Hence, there is no justification for Greystone's radical proposal to toss out decades of precedent and extend the project completion rule to regulatory takings.

C. Greystone's obligations to perform road and utility improvements are subject to the same four-year and 180-day deadlines.

Greystone is incorrect in suggesting its asserted "cause of action" for the improvements arose separately. As discussed in section VI at page 35, the obligation to provide road and utility improvements derived from its subdivision of the property. This continuing obligation also was reflected in the *Development Agreement*. (See Statement of the Facts.) Thus, if there was something to challenge, the cause of action accrued at the same time as the cause of action for the conveyance of the property. Instead, Greystone waited until July 27, 2007 to inquire into the status of the improvements, and even then did not challenge the City's conclusion or file a notice of claim. The claim arose from earlier commitments, not from the City's statement that it would not release Greystone from those commitments. Accordingly, the claim is not new and is tardy under the statute of limitations. Even if it were new, it would be tardy under the ITCA. In fact,

Greystone never submitted a notice of claim concerning the construction of the improvements.

IV. GREYSTONE'S CLAIMS ALSO FAIL THE EXHAUSTION AND VOLUNTARY ACTION TESTS ESTABLISHED UNDER *KMST*.

As documented above, the conveyance of property to the City was proposed by Greystone itself in its March 20, 2006 applications. The City expressly advised Greystone that the City could not compel this conveyance. *Groenevelt Aff.*, Exh. P & Q, Finding 16, p. 8. Yet Greystone chose to proceed anyway, without objection to the P&Z's recommendation upon review by the City Council, without seeking an amendment of the PUD (as provided in the McCall Zoning Ordinance § 3.10.12, reproduced in Exhibit B), and without seeking judicial review under LLUPA.

This closely parallels the facts in *KMST, LLC v. County of Ada*, 138 Idaho 577, 67 P.3d 56 (2003). In that case, a developer brought two claims against the Ada County Highway District ("ACHD"), one in connection with ACHD's road dedication requirement and another in connection with ACHD's impact fees. Other claims against Ada County were not pursued on appeal. The Idaho Supreme Court dismissed both ACHD claims on technical grounds—exhaustion (as to the impact fees) and ripeness (as to the road dedication).[15] Nevertheless, the *KMST* Court went on to opine as to the merits of the takings claim on the road dedication saying that this was not a taking because it was voluntarily offered. In essence, it was a not a "taking" but a "giving" (our words, not the Court's). The exhaustion and voluntariness issues are discussed in turn below.

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[15] The ripeness issue was framed in terms of the "final decision" requirement established in *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), discussed below. In *KMST*, the plaintiff sued ACHD for requiring a road dedication, but the Court pointed out that ACHD merely made what amounted to a recommendation. It was Ada County that actually imposed the road dedication requirement. For reasons that are unclear, the plaintiff failed to pursue its claim against Ada County on appeal. That was a mistake, because the decision by ACHD was not a final decision within the meaning of *Williamson County*. While other aspects of *Williamson County* are directly on point to the case at bar, the unique facts involving two agencies that gave rise to the application of *Williamson County* in *KMST* are not present in this case.

A. Greystone did not exhaust its administrative remedies.

(1) Greystone failed to exhaust.

The exhaustion requirement proved a fatal flaw for the plaintiff in *KMST*. This Court explained in *KMST*, 138 Idaho at 583, 67 P.3d at 62:

> [KMST] simply paid the impact fees in the amount initially calculated. Having done so, it cannot now claim that the amount of the impact fees constituted an unconstitutional taking of its property.
>
> As a general rule, a party must exhaust administrative remedies before resorting to court to challenge the validity of administrative acts. . . . KMST had the opportunity to challenge the calculation of the impact fees administratively, and it chose not to do so.

Greystone is in the same position. Greystone could have informed the City that Ordinance Nos. 819 and 820 were unlawful—whether they applied to it or not—and that it had no intention of accommodating the City's desires for a contribution of property for affordable housing. Instead, Greystone proposed and ultimately signed a *Development Agreement* providing a million-dollar gift to the City in exchange for a modest waiver of fees that might be charged under Ordinance 820. By failing to object, or to seek an amendment (as provided in the McCall Zoning Ordinance § 3.10.12, reproduced in Exhibit B), they failed to exhaust.[16]

Exhaustion is important. In an oft-quoted statement, this Court explained:

> [I]mportant policy considerations underlie the requirement for exhausting administrative remedies, such as providing the opportunity for mitigating or curing errors without judicial intervention, deferring to the administrative processes established by the Legislature and the administrative body, and the sense of comity for the quasi-judicial functions of the administrative body.

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[16] In their discovery responses, Greystone admits that it did not appeal any of the approvals and did not object to the *Development Agreement* itself. R. Vol. II, pp. 194-95 (Answer No. 2), p. 197 (Response to RFP No. 4). Greystone claims that it did not appeal or object because it presumed the City had the legal right to require the affordable housing contribution. Ignorance of the alleged legal basis for their objections does not excuse its failure to exhaust. *BHA II*, 141 Idaho at 174, 108 P.3d at 321.

White v. Bannock County Comm'rs, 139 Idaho 396, 401-02, 80 P.3d 332, 337-38 (2003).

(2) Exceptions to the exhaustion requirement do not apply here.

Greystone seeks to hide behind the two exceptions to the requirement of administrative exhaustion: "(a) when the interests of justice so require, and (b) when the agency acted outside its authority," *KMST, LLC v. County of Ada*, 138 Idaho 577, 583, 67 P.3d 56, 62 (2003). In *Park v. Banbury*, 143 Idaho 576, 149 P.3d 851 (2006), the Court described the exceptions this way: "Styled differently, courts will not require exhaustion 'when exhaustion will involve irreparable injury and when the agency is palpably without jurisdiction.'" *Park*, 143 Idaho at 581, 149 P.3d at 856 (quoting *Sierra Life Ins. Co. v. Granata*, 99 Idaho 624, 627, 586 P.2d 1068, 1071 (1978)). Regardless of how these exceptions are styled, they do not apply here.

(a) Greystone cannot meet the "interests of justice" exception.

Greystone fails the "interests of justice" test. In *Park*, the Court explained: "Typically this situation occurs where irreparable harm results from the administrative process itself. The standard may also be satisfied by showing that the agency lacks power to grant the requested relief, i.e., that exhaustion would be futile." *Park*, 143 Idaho at 581, 149 P.3d at 856 (citations omitted). Plainly, this does not apply here.

To the contrary, the policy considerations articulated by the Court in *White* are poignantly applicable. Had Greystone notified the City that it believed a condition or agreement providing for affordable housing might be unlawful, the City would have been able to assess the situation and decide whether it wanted to accept the property. Indeed, it is seems unlikely that the City would have accepted the property and spent money developing it if Greystone had questioned the legality of the arrangement at the time. Instead, Greystone chose to enter into the *Development Agreement* and comply with its terms. The City also complied with its terms and, as a result,

now finds itself spending money to defend a lawsuit. The exhaustion requirement is designed to avoid lawsuits like this one. Simply put, there is no showing of any potential irreparable harm that would have occurred to Greystone had it exhausted its administrative remedies. Consequently, there is no reason to excuse Greystone's failure to exhaust.

(b) Exhaustion exception 2: The "outside the agency's authority" exception does not apply.

It is doubtful that this second exception applies at all to "as applied" challenges. A review of this Court's decisions strongly suggests that this exception applies only to facial challenges.[17] This makes sense, because further administrative process would add nothing to the purely legal question presented in a facial challenge. In contrast, "a district court cannot properly engage in an 'as applied' constitutional challenge until a complete factual record has been developed." *American Falls Reservoir Dist. No. 2 v. IDWR*, 143 Idaho 862, 872, 154 P.3d 433, 443 (2007). "Thus, the exception for when an agency exceeds its authority does not apply

[17] After all, *KMST* was an "as applied" takings case, just like this one. If the allegation of an uncompensated taking was sufficient to trigger the exception in an "as applied" challenge, then the exception would have applied there. Instead, this Court recited the exceptions and declared that they did not apply. *KMST*, 138 Idaho 583, 67 P.3d 62. A similar result obtained in *Park*. "Even if these claims are interpreted as a constitutional challenge to the validity of a statute or rule, it does not follow that exhaustion is waived. Although facial challenges to the validity of a statute or ordinance need not proceed through administrative channels, as-applied challenges may be required to do so." *Park*, 143 Idaho at 581-82, 149 P.3d at 856-57. *White* also involved an "as applied" constitutional challenge to the issuance of a conditional use permit. The Court did not apply any exceptions to the exhaustion rule. "Whether or not Monroc's request for a conditional use permit met the requirements of the statute or satisfied due process is an issue which should have been pursued before the county zoning authorities under the procedures of the ordinance and LLUPA, I.C. § 67-6501 et seq., and not by the district court through a collateral attack." *White*, 139 Idaho at 400, 80 P.3d at 336. "We also conclude that the recognized exceptions to the exhaustion doctrine do not apply to the present case where the question of a conditional use permit 'is one within the zoning authority's specialization and when the administrative remedy is as likely as the judicial remedy to provide the wanted relief.'" *White*, 139 Idaho at 402, 80 P.3d at 338. Similarly, in *Palmer v. Bd. of County Comm'rs of Blaine County*, 117 Idaho 562, 564, 790 P.2d 343, 345 (1990), the Court applied no exception to the exhaustion requirement in that case where "there is no challenge to the validity of Ordinance 77-5. . . . This Court has frequently announced that except in unusual circumstances parties must exhaust their administrative remedies before seeking judicial recourse." In *Service Employees Int'l Union, Local 6 v. Idaho Dep't of Health & Welfare*, 106 Idaho 756, 762, 683 P.2d 404, 410 (1984), this Court said: "Our disposition of this case makes it unnecessary for us to address appellant's constitutional claims. Exhaustion of administrative remedies is generally required before constitutional claims are raised." This, too, was an "as applied" constitutional challenge in which the Court found it unnecessary to address the exceptions to the exhaustion rule.

unless the CM Rules are facially unconstitutional." *Id.*[18]

Even if the "outside the agency's authority" exception does apply to "as applied" challenges like this one, the test is not satisfied here. The City was not "palpably without jurisdiction." *Sierra Life Ins. Co. v. Granata*, 99 Idaho 624, 627, 586 P.2d 1068, 1071 (1978) (quoting 3 Kenneth Davis, *Administrative Law Treatise* § 20.01 (1958)) (*quoted again in Fairway Development Co. v. Bannock County*, 119 Idaho 121, 125, 804 P.2d 294, 298 (1990); *Regan v. Kootenai County*, 140 Idaho 721, 726, 100 P.3d 615, 620 (2004); *Park v. Banbury*, 143 Idaho 576, 581, 149 P.3d 851, 856 (2006)). Its actions in agreeing to the *Development Agreement* were expressly not premised on or compelled by the affordable housing ordinances. Rather, the City was acting within its authority under LLUPA to issue PUDs and subdivision permits. Only when an entity strays entirely outside its regulatory authority (for instance, if a City sought to rule on the validity of an applicant's water rights or to invade the exclusive domain of environmental regulatory agencies) may the action be challenged without exhaustion. Where, as here, the entity has regulatory authority over the subject matter and the only question is whether it has exercised that authority constitutionally, then exhaustion is required.

The same issue was considered in *Sold, Inc. v. Town of Gorham*, 868 A.2d 172 (Maine 2005). See footnote 6 at page 13. Maine law recognizes the same exception to the exhaustion requirement for government actions that are "beyond the jurisdiction or authority of the administrative body to act." *Sold, Inc.*, 868 A.2d at 176. In that case, the Court found that the imposition of impact fees as conditions of approval was within the jurisdiction and authority of the town, even in the face of statutory and constitutional challenges.

[18] In *American Falls*, the Court explained that trying to figure out whether an agency acted outside its authority is essentially a circular argument. *Id.* Thus, a plaintiff may not avoid the exhaustion requirement merely by alleging that the agency's action is unconstitutional and therefore beyond the scope of its authority. If that were the case, exhaustion would never be required in a constitutional challenge. Rather, for the exception to apply, the

> Here, there is no dispute that the Planning Board had authority to consider, approve, and attach conditions to approvals of subdivisions. Plaintiffs only challenge one condition of the subdivision approval as inconsistent with statutory and constitutional requirements. Such challenges are the essence of matters that must be brought pursuant to Rule 80B to question whether the particular action of a municipal administrative agency is consistent with the requirements of law.

Id. Here, the City had authority to issue subdivision and PUD permits and to impose conditions on them, so exhaustion is required and Greystone's collateral attack is barred.

B. Greystone's actions were voluntary.

The *KMST* Court, after discussing exhaustion, went on to say that even if ACHD's recommendation had been a final decision, it would not have constituted a taking because the dedication was voluntary. In a pre-application meeting with ACHD staff, KMST was advised that staff would recommend a requirement of a road dedication. In order to move things along, KMST agreed to the dedication and included it in its application. This proved fatal to KMST's taking claim.

> KMST representatives included the construction and dedication of Bird Street in the application because they were concerned that failing to do so would delay closing on the property and development of the property. KMST's property was not taken. It voluntarily decided to dedicate the road to the public in order to speed approval of its development. Having done so, it cannot now claim that its property was "taken."

KMST, 138 Idaho at 582, 67 P.3d at 61 (emphasis supplied) (internal quotations identifying district court's language omitted). This language is significant because it shows that it makes no difference that the developer was motivated by a desire to speed the processing of its application; the developer's action is still deemed voluntary. In other words, the action does not need to be voluntary in the sense that one might give a birthday gift to one's mother. It need not be

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plaintiff must show that the agency had no authority over the subject matter at all.

compelled by altruism or generosity. All that is required is that the developer wants to move things along and therefore acquiesces to the requests made rather than objecting.

Greystone's situation here is indistinguishable. Perhaps the developers were not pleased with the idea of providing affordable housing (though nothing in the pre-litigation record suggests this). Greystone could have told the City: "We will not give you anything. You cannot require this." Instead, Greystone proposed the conveyance in its applications, raised no objections, sought no amendment during the permitting process, signed the *Development Agreement*, and conveyed the nine housing units.[19] The fact that the conveyance was voluntary was expressly stated in Finding 16 of the development approvals (*Groenevelt Aff.*, Exh. P & Q): "While the applicant is not required to provide a Community Housing Plan, the applicant has agreed to deed nine single family residential lots that constitute Phase 3 of the project to the City of McCall to provide Community Housing."[20] Under *KMST*, Greystone cannot now be heard to complain that the payments it agreed to make were an unlawful taking.[21]

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[19] Greystone admits in Answer No. 16 of its Discovery Responses that it never cautioned the City that it should not rely on the *Development Agreement*. R. Vol. II, p. 204.

[20] The District Court incorrectly attributed this statement to Greystone rather than the City. This was pointed out to the District Court by both parties on reconsideration. It is of zero consequence. The statement was a contemporaneous on-the-record recitation of what occurred. Greystone never challenged the statement until now.

[21] The recognition in *KMST* that voluntary actions do not give rise to takings is not undercut by the Court's holding in *BHA Investments, Inc. v. City of Boise* ("*BHA II*"), 141 Idaho 168, 108 P.3d 315 (2004), which held that plaintiffs are not required to pay under protest as a prerequisite to challenging an unlawful tax. The *BHA II* case involved a transfer fee charged by the City of Boise on liquor licenses. The Court ruled in a prior case, *BHA Investments, Inc. v. City of Boise* ("*BHA I*"), 138 Idaho 356, 357-58, 63 P.3d 482, 483-84 (2004), that the City had no regulatory authority whatsoever with respect to the transfer of liquor licenses. Only the State has such authority. *Id.* *BHA II* involved two consolidated cases, the original *BHA I* case following remand and a different case. In *BHA II*, the district court dismissed a claim by a different set of plaintiffs because they had not paid the fee under protest. This was based on an old line of cases (*e.g.*, *Walker v. Wedgwood*, 64 Idaho 285, 130 P.2d 856 (1942)) holding that plaintiffs must pay taxes under protest to preserve the right to request a refund. The Supreme Court reversed the district court on that point, ruling that the requirement that taxes be paid under protest applies to lawful taxes, and is inapplicable in cases involving unlawful taxes. *BHA II*, 141 Idaho at 176, 108 P.3d at 323. In essence, the City of Boise tried to pull a fast one by saying, "OK, if our liquor license transfer fee is really a tax as you claim, you should have paid it under protest." The Court did not buy it. This has no applicability here. The City is not arguing that Greystone should have paid under protest because the *Development Agreement* constituted a tax. It is arguing, under *KMST*, that Greystone cannot claim a taking where they agreed to the transaction. That is a different kettle of fish. Indeed, in *KMST* the Court noted one of the reasons that it was clear that plaintiff's action was voluntary was

Greystone nevertheless contends that it felt pressured or coerced into this—though it plainly did not say so at the time. The only evidence of "pressure" is found in self-serving affidavits created during the course of this litigation and an after-the-fact staff memo that did not apply to Greystone in any event.[22] But these allegations are of no consequence. Greystone's subjective state of mind is not material. Even if each of Greystone's affidavits is accepted as true, they do not establish facts that take Greystone out of the same situation faced by the plaintiff in *KMST*. Whatever pressure Greystone allegedly felt—the desire to please City officials, the desire to speed approvals of building permits, or the desire to curry favor with the community—this contribution was voluntary as a matter of law because it was not required and was included in Greystone's own development applications. Under this Court's precedents, it was a "giving," not a taking.

V. EQUITABLE PRINCIPLES DICTATE DISMISSAL OF GREYSTONE'S LAWSUIT.

Putting all of the above aside and looking at the case purely from the standpoint of equity, Greystone's state and federal claims should be denied. Greystone, of course, will contend that equity favors the developers because the City's affordable housing ordinances were declared invalid. But those ordinances did not control or compel Greystone's conveyance. Even if they did, the record shows that the City was acting in good faith to address a serious problem. The City retained consultants with national expertise in affordable housing ordinances, relied on

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because they did not pay the impact fees under protest. "[Plaintiff] did not request an individual assessment of the amount of its impact fees; it did not appeal the calculation of the fees; and it did not pay the fees assessed under protest. It simply paid the impact fees in the amount initially calculated." *KMST*, 138 Idaho at 583, 67 P.3d at 62 (emphasis supplied).

[22] Greystone continues to harp on an October 19, 2006 internal staff memo. The memo described implementation of Ordinance No. 827 adopted on September 28, 2006 (moratorium on new development applications) and No. 828 adopted on October 12, 2006 (exemption from moratorium for developments offering voluntary affordable housing mitigation). As more fully explained in prior briefing, R. Vol. III, 397-98, these ordinances and policies were adopted in response to the *Mountain Central* litigation after Greystone had conveyed the nine lots on July 16, 2006. Whether they were lawful is moot and, in any event, irrelevant to Greystone. Greystone could not have felt pressure from something that did not exist at the time of its actions.

their advice (which failed to take into account Idaho's unique Constitution), and acted in an honest belief that it was within the law. See recitals in Ordinances 819 and 820 describing housing needs (*Groenevelt Aff.*, Exh. F & G). Although Greystone was not required to provide anything, it proposed the conveyance and entered into an agreement to provide nine lots for affordable housing. The City reasonably relied on that agreement, invested in developing those properties, and made them available to persons of modest income providing vital services to the community. Had Greystone raised its concern during the permitting process—that is, if it had simply said that the conveyance was not voluntary—the City might well have chosen a different course of action. Instead, the City took Greystone at its word and made irretrievable commitments based Greystone's representations confirmed in a written contract. The bell cannot now be un-rung. At least two equitable defenses are directly applicable.

First, the law abhors the unjust enrichment of one party at the expense of another. 66 Am. Jur. 2d *Restitution and Implied Contracts* § 8 (2001). On October 12, 2006, the *Star-News* published an article entitled "McCall Breaks Ground on Affordable Housing." The article featured a photograph of Greystone Village developers Richard Hehr and Steve Benad together with the Mayor and other dignitaries at the groundbreaking ceremony. The article stated, "The lots for the [affordable housing] were donated to the city by developer, Steve Benad of Greystone Village, LLC, as part of Benad's development agreement with the city." A sign placed at the development touted "Land Donated by Greystone Village, LLC." The news article and related photographs appear as *Groenevelt Aff.,* Exh. T. Greystone's participation in the groundbreaking demonstrates that it sought and received the benefit of the good will generated by its very public gift to the City. Allowing Greystone to recover the value of its self-described "donated" land after receiving this public boost to its development would result in an unjust

enrichment for Greystone at the expense of the City. Equity does not permit Greystone to profit from the City's expenditure of public funds without providing anything in return. *See Barry v. Pacific West Construction, Inc.*, 140 Idaho 827, 103 P.3d 440 (2004) (general contractor was unjustly enriched by uncompensated work of subcontractor).

Second, the equitable principle of laches provides that a plaintiff is estopped from asserting the alleged invasion of his rights when: (i) the plaintiff delayed in asserting these rights; (ii) the plaintiff had notice and an opportunity to institute a suit; (iii) the defendant did not know that the plaintiff would assert such rights; and (iv) the delayed suit would injure or prejudice the defendant. *Finucane v. Village of Hayden*, 86 Idaho 199, 205, 384 P.2d 236, 240 (1963). All those tests are met here. Thus, if owing to some technicality, Greystone is excused from its failure to exhaust its administrative and judicial remedies and its failure to meet the 180-day, two-year, and four-year deadlines, equity should step in and bar relief. Allowing Greystone to recover the negotiated conveyance of the nine lots now will require the City to burden its citizens to raise money to pay Greystone. On no occasion did Greystone raise any objection to the *Development Agreement.* Instead, it justifies the delay on the basis that it assumed the City's actions were lawful. That is insufficient to overcome the equities favoring the City.

The equitable principles of promissory estoppel[23] and waiver[24] also appear to apply.

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[23] Courts in equity can use "promissory estoppel" to enforce a promise made without consideration when the following elements are present: (i) the detriment suffered in reliance on the promise was substantial in an economic sense; (ii) the substantial loss to the promisee acting in reliance was, or should have been, foreseen by the promisor; and (iii) the promisee must have acted reasonably in justifiable reliance on the promise made. *Rule Sales and Service, Inc. v. U.S. Bank National Association*, 133 Idaho 669, 674, 991 P.2d 857, 862 (Ct. App. 2000). Put another way, "the doctrine requires only that it be foreseeable to the promisor that the promisee would take some action or forbearance in reliance upon the promise and would thereby suffer substantial loss if the promise were to be dishonored." *Id.* at 675, 991 P.2d at 863. In this action, Greystone is claiming a right to take back its promise in the *Development Agreement.* But the City has relied on that promise, reasonably and justifiably. As a result, it would suffer a substantial economic detriment if it were required to pay Greystone for its gift.

[24] The equitable concept of "waiver" applies in an action for breach of contract and states that "a party who accepts the other's performance without objection is assumed to have received the performance contemplated by the agreement." 17A Am. Jur. 2d *Contracts* § 640 (2001). "A waiver is a voluntary, intentional relinquishment of a

VI. GREYSTONE'S ROAD AND UTILITY IMPROVEMENTS CLAIM IS NOT A SEPARATE CLAIM AND WAS PROPERLY DISMISSED ALONG WITH THE REST OF THE LAWSUIT.

Greystone contends that the District Court improperly granted summary judgment as to its "improvements claim" (that it was required to make road and utility improvements on the donated property). *Appellants' Brief* at 10-14. This is plainly an afterthought. It is not only tardy but wrong. The District Court made quick work of it. R. Vol. IV, p. 634.

The lots conveyed to the City for affordable housing were originally Phase III of Greystone's development project. When they were platted, Greystone committed to provide the usual road improvements (storm drains and street signs) and utility connections (water, sewer, and fire hydrants) required for all subdivisions. McCall Subdivision Ordinance §§ 3-21-250 to 3-21-260 (now recodified as amended at 9.6.02; reproduced in Exhibit C). When Greystone later decided to convey the lots to the City, it prepared an appraisal of its gift. That appraised value, not surprisingly, was based on this recited fact: "Public water and sewer systems will be available for hook up at the street." *Groenevelt Aff.*, Exh. M, at 2. Now, Greystone contends that it was surprised that it was required to fulfill its obligation imposed during the platting process. Greystone also contends that this was a separate "claim" which somehow survived the City's motion to dismiss. This argument fails the straight face test.

Greystone observes that we have notice pleading. But nothing in the *First Amended Complaint* puts anyone on notice that Greystone asserted a separate "claim" with respect to road and utility improvements. References to both deeds and utility improvements are sprinkled

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known right or advantage [and the] party asserting the waiver must show that he has acted in reliance upon such a waiver and reasonably altered his position to his detriment." *Dennett v. Kuenzli*, 130 Idaho 21, 26, 936 P.2d 219, 224 (Ct. App. 1997). Here, Greystone is not claiming breach of contract against the City, but the principles behind the concept of waiver instruct that Greystone cannot now complain that the *Development Agreement* was unlawful. Had Greystone objected at the time, the City could have evaluated the legal basis of the *Development Agreement* and made an informed decision as to whether to proceed. In the absence of such an objection, the City acted in reliance on its contract with the Greystone. Waiver principles should prevent Greystone from now asserting that the contract is not binding.

evenly throughout each of the three counts. Greystone points to individual paragraphs in the complaint mentioning the improvements. So what? As set out in Greystone's complaint, the legal theory and the relief sought with respect to money spent on improvements of the nine lots is identical to the legal theory and relief sought with respect to the conveyance of the nine lots. At one point, they are referred to in the same breath: "Plaintiffs are entitled to be made whole for the value of real property and construction improvements which benefitted the City as a result of the City's illegal acts in an amount to be proven at trial, but not less than $10,000." *First Amended Complaint* at ¶ 28, R. Vol. I, p. 10 (emphasis supplied).

But it really does not matter whether this is perceived as one claim or two. The indisputable fact is, McCall put all claims into play in its dispositive motion. "This motion seeks dismissal with prejudice of all of Plaintiffs' claims." *City's Motion for Summary Judgment* at 2, R. Vol. I, p. 144.[25] If Greystone perceived that its "improvements claim" was separate from its "deed claim" and if it believed that that the former was not subject to all the same defenses as the latter, then it should have said so in response to the *City's Motion for Summary Judgment* addressing all claims. It did not.[26] Only after losing its lawsuit did Greystone concoct this argument in an effort to save some shred of its case and fend off an award of attorney fees. Thus, it presented this issue for the first time in its *Motion for Reconsideration and Objection to*

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[25] Greystone misstates the record when it says, "The City's Motion for Summary Judgment, however, only addressed Greystone's claim for just compensation relative to conveyance of the nine lots." *Appellants' Brief* at 12. Greystone also contends, "The City's Motion for Summary Judgment was completely silent as to its requirement that Greystone construct roadway improvements and make utilities available to each of these nine lots, and Greystone's claim to recover these costs." *Id.* If Greystone is referring to the City's briefing rather than its motion, it is true that the City did not present separate arguments on what Greystone now contends are two separate "claims." It had no reason to do so, because it perceives no difference between them.

[26] In *Plaintiffs' Memorandum in Opposition to Defendant's Motion for Summary Judgment*, Greystone stated: "The City has set forth its arguments in favor of summary judgment divided by state law based claims and federal based claims. Greystone will respond in kind." R. Vol. II, p. 276. Greystone goes on to mention its "inverse condemnation claim" or its "claims" more than 20 times in that brief without once distinguishing between the conveyance of the lots and the construction of the improvements.

Proposed Judgment dated June 29, 2011 (R. Vol. II, pp. 373-74).

Even if Greystone is allowed to think up new theories after summary judgment is granted against it, its attempt to re-characterize the improvements issue as a separate claim accomplishes nothing. Each of the defenses the City presented in support of the *City's Motion for Summary Judgment* applies equally to the conveyance and the improvements. In reality, Greystone's so-called improvements claim is no more than an element of damages in connection with its conveyance of Phase III of its Greystone Village Project to the City. If Greystone had prevailed, it would have recovered not only the value of the bare land conveyed but the requisite improvements as well. But Greystone did not prevail. In any event, the deed and improvement claims have the same legal premise—that they are unlawful taxes—and arise from the same factual allegation—that the City forced Greystone to convey and upgrade the nine lots. The two claims are joined at the hip. If one falls, the other must, too. Greystone's contention that the claims are separate and have separate accrual dates is an implausible grasp at a straw.

VII. GREYSTONE'S FEDERAL TAKING CLAIM WAS IMPROPERLY PLED, UNRIPE UNDER *WILLIAMSON COUNTY*, AND, IN ANY EVENT, UNTIMELY.

In addition to the defenses discussed above, the following defenses are applicable exclusively to the federal claims. First, § 1983 is Greystone's exclusive means of pursuing its federal claims. Second, Greystone failed prong one of *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985)[27] (the "final decision" test) because, as the District Court said, "the Plaintiffs failed to contest the Development Agreement." *Memorandum Decision*, R. Vol. II, p. 369. Third, Greystone failed prong two of *Williamson County* (the "state remedies" test) because, as the District Court said, "the Plaintiffs failed to

[27] *Williamson County* has been recognized and followed by the Idaho Supreme Court. *KMST, LLC v. County of Ada*, 138 Idaho 577, 581-82, 67 P.3d 56, 60-61 (2003); *City of Coeur d'Alene v. Simpson*, 142 Idaho 839, 845-46, 136 P.3d 310, 316-17 (2006).

seek judicial review of the decision by the City." *Id.* Fourth, if Greystone somehow survives those hurdles, its federal claims would fail under the two-year statute of limitations. Contrary to Greystone's brief, the District Court did not find it necessary to reach the first and fourth issues. These are discussed in turn below.

A. Section 1983 is the exclusive means of pursuing these federal constitutional claims.

Where Congress provides no statutory cause of action, the U.S. Supreme Court has recognized the right of persons to bring actions alleging constitutional violations directly under the U.S. Constitution. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389 (1971). Such lawsuits are known as *Bivens* actions. However, most courts and commentators have concluded that where Congress has provided a statutory cause of action (such as § 1983), that mechanism is exclusive.[28] The Ninth Circuit strictly adheres to this approach, ruling repeatedly and consistently that federal constitutional claims against persons acting under color of state law must be brought under § 1983, or not at all.[29]

Some confusion on this point has been introduced by an earlier case, *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304 (1987), in which the Supreme Court said: "We have recognized that a landowner is entitled to bring an action in

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[28] "Since *Bivens*, the Court has applied a two-prong test to determine whether an implied cause of action is necessary. According to this test, a *Bivens* action is permissible unless either (1) special factors counsel hesitation or (2) Congress has provided an alternative remedy intended to be an equally effective substitute for the Bivens claim." David C. Nutter, *Two Approaches To Determine Whether an Implied Cause of Action Under the Constitution Is Necessary: The Changing Scope of the Bivens Action*, 19 Georgia L. Rev. 683, 683-84 (1985).

[29] "Plaintiff has no cause of action directly under the United States Constitution. We have previously held that a litigant complaining of a violation of a constitutional right must utilize 42 U.S.C. § 1983." *Azul-Pacifico, Inc. v. City of Los Angeles*, 973 F.2d 704, 705 (9th Cir. 1992), *cert. denied*, 506 U.S. 1081 (1993). "For these reasons, we have held that a plaintiff may not sue a state defendant directly under the Constitution where section 1983 provides a remedy, even if that remedy is not available to the plaintiff." *Martinez v. City of Los Angeles*, 141 F.3d 1373, 1382 (9th Cir 1998). "Taking claims must be brought under § 1983." *Hacienda Valley Mobile Estates v. City of Morgan Hill*, 353 F.3d 651, 655 (9th Cir. 2003), *cert. denied*, 543 U.S. 1041 (2004). An attempt to evade this result by asserting that *Azul-Pacifico* applies only to damage-based takings claims and not to claims seeking injunctive relief

inverse condemnation as a result of 'the self-executing character of the constitutional provision with respect to compensation.'" *First English* at 315 (internal quotation marks omitted). That, of course, is true in the context of a *Bivens* action against a federal defendant. Why the Court said it in this case involving a city is unclear. It appears that this statement was made as a premise for the substantive issue in the case (temporary takings) and not as a repudiation of the view that direct constitutional challenges are limited to situations where no statutory cause of action has been provided. Indeed, the *First English* decision does not even mention § 1983.[30] Given that § 1983 was not discussed, it is fair to say that *First English* is not on point.

That is clearly the view of the Ninth Circuit, which, in *Azul-Pacifico* and its progeny (decided after *First English*), has continued to adhere to the position that § 1983 is exclusive. Nevertheless, a few courts in other circuits have assumed, without deciding, that *First English* offers a way for inverse condemnation cases to proceed around § 1983. *E.g., Bieneman v. City of Chicago,* 864 F.2d 463 (7th Cir. 1988); *287 Corporate Center Associates v. Township of Bridgewater*, 101 F.3d 320 (3rd Cir. 1996); *Lawyer v. Hilton Head Public Service Dist. No. 1*, 220 F.3d 298 (4th Cir. 2000). These cases, however, address the subject in dictum and/or dispose of the claims on other grounds (e.g., the statute of limitations). And they are far outweighed by

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was rejected by the Ninth Circuit in *Golden Gate Hotel Assn. v. City and County of San Francisco*, 76 F.3d 386 (list of unpublished decisions), 1996 WL 26944 at *1 (9th Cir. 1996).

[30] The *First English* opinion does not reference § 1983, and the dissent mentions it only in another context. Nor do the parties' briefs. Nor does the case on remand, *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 210 Cal.App.3d 1353, 258 Cal. Rptr. 893 (1989). This may be explained by the peculiar posture of the case. It was brought in state court pursuant to a complaint that alleged only violations of the state constitution. Somehow, in an apparent afterthought, the federal takings claim was introduced at the state appellate level. The U.S. Supreme Court said that was good enough to allow the case to be brought under 28 U.S.C. § 1257. *First English*, 482 U.S. at 313 n.8. Nor does the case cited by the Court for this proposition, *United States v. Clarke*, 445 U.S. 253, 257 (1980), have anything to do with the *Bivens* exception issue; *Clarke* involved a federal actor. It appears that no one thought to ask whether a statutory cause of action might supplant the direct constitutional cause of action. In any event, the Court did not address this question.

contrary cases[31] and other authority.[32]

Greystone pins its hopes on a footnote by this Court in *BHA Investments, Inc. v. City of Boise* ("*BHA II*"), 141 Idaho 168, 176 n.2, 108 P.3d 315, 323 n.2 (2004). In that case, the Court noted in passing that the plaintiffs brought their action directly under the federal Constitution and that doing so was permissible under *First English*. However, this was not an issue litigated in the case, and, in any event, the Court made no mention of Ninth Circuit and other authority to the contrary. It was certainly not a ruling rejecting *Azul-Pacifico*. That question has never been presented to this Court. Accordingly, the City respectfully urges that the dictum in the footnote in *BHA II* not be followed in light of the overwhelming authority to the contrary.

It bears emphasis that even if this Court were to rule that Greystone is not bound by *Azul-Pacifico* and may bring its federal claims independent of § 1983, those claims are barred

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[31] Cases from other jurisdictions reaching the same conclusion as *Azul-Pacifico* include the following: *Smith v. Dep't of Public Health*, 410 N.W.2d 749, 787 (Mich. 1987) ("Thus, both *Chappell* and *Bush* signal a retrenchment from the broad remedial scope evident in the Court's earlier *Bivens*, *Davis*, and *Carlson* opinions. Both *Chappell* and *Bush* suggest greater caution and increased willingness on the part of the Court to defer to Congress on the question whether to create damages remedies for violations of the federal constitution."); *Kelley Property Development, Inc. v. Town of Lebanon*, 627 A.2d 909, 921 (Conn. 1993) ("In its current configuration, the *Bivens* line of United States Supreme Court cases thus appears to require a would be *Bivens* plaintiff to establish that he or she would lack any remedy for alleged constitutional injuries if a damages remedy were not created. It is no longer sufficient under federal law to allege that the available statutory or administrative mechanisms do not afford as complete a remedy as a *Bivens* action would provide."); *Wax 'n Works v. City of St. Paul*, 213 F.3d 1016, 1019 (8th Cir. 2000) (Plaintiff asserted claim directly under Fourteenth Amendment; court treated it as under § 1983 and denied relief on exhaustion/ripeness grounds); *Thomas v. Shipka*, 818 F.2d 496, 499 (6th Cir. 1987), *vacated on other grounds & remanded*, 488 U.S. 1036 (1989) (when § 1983 action is precluded by statute of limitations, plaintiff may not bring separate action directly under the Constitution).

[32] "Thus, the availability of the § 1983 remedy precludes reliance upon the *Bivens* doctrine." Martin A. Schwartz, *Section 1983 Litigation Claims and Defenses*, § 1.05 (2010) (available on Westlaw as SNETLCD s 1.05). Another hornbook on § 1983 notes a variety of federal cases reaching the same conclusion, concluding, "The Ninth Circuit asserted that Fourteenth Amendment actions for damages against state defendants are precluded by the availability of § 1983." Sheldon Nahmod, *Civil Rights and Civil Liberties Litigation: The Law of Section 1983*, § 6:59 (2010) (available on Westlaw at CIVLIBLIT § 6:59). Another law professor concludes: "Under *Bivens*, the courts are to refrain from a *Bivens*-type action for damages only when Congress has created an alternative remedy. Originally, the Court withheld a *Bivens* damages remedy, because unnecessary, only when the remedy provided by Congress was equally effective. Since *Bivens*, however, the Court has retreated from that principle and now refuses a damages action whenever Congress has made available some relief even if not equal to the damages remedy." Alan R. Madry, *Private Accountability and the Fourteenth Amendment; State Action, Federalism and the Courts*, 59 Missouri L. Rev. 499, 551 (1994) (footnote cites David C. Nutter, Note, *Two Approaches to Determine Whether an*

nevertheless by *Williamson County* and/or the two-year statute of limitations discussed below. These defenses are not tied to § 1983 and apply equally to direct constitutional challenges.

B. Greystone's federal claims are blocked by the two special "ripeness" tests in *Williamson County*.

(1) Test 1: The "final decision" requirement

In *Williamson County*, the Supreme Court established two special ripeness tests for plaintiffs alleging an uncompensated taking under the federal Constitution. The first test is that the decision appealed from must have been a "final decision." That is, the defendant agency must have "arrived at a final, definitive position regarding how it will apply the regulations at issue." *Williamson County*, 473 U.S. at 191. The plaintiff's problem in *Williamson County* was its failure to seek a variance. *Williamson County* at 190. Greystone says it need not be concerned because in its case "there was no variance for Greystone to seek." *Appellants' Brief* at 20. But the "final decision" requirement in *Williamson County* is not limited to variances. Greystone could have done many things to determine whether it could build the Greystone Project without contributing land for affordable housing. Most obviously, it could have submitted development applications that did not include such a conveyance. It could have withdrawn its offer. It could have objected when the P&Z recommended approval conditioned on such a *Development Agreement*. It could have proposed a *Development Agreement* that did not provide for the conveyance. Finally, it could have sought an amendment to the PUD conditions under the McCall Zoning Ordinance § 3.10.12 (reproduced in Exhibit B).

The Supreme Court explained why requiring the plaintiff to probe the decision maker in this way is a fundamental prerequisite to a takings claim. "Our reluctance to examine taking

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Implied Cause of Action under the Constitution is Necessary: The Changing Scope of the Bivens Action, 19 Ga. L. Rev. 683 (1985)).

claims until such a final decision has been made is compelled by the very nature of the inquiry required by the Just Compensation Clause." *Williamson County* at 190 (citing *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264 (1981); *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978)). The message of these four Supreme Court cases is that developers must take full advantage of opportunities for securing relief from the local governing body—whether that be by means of a variance or otherwise. The developer certainly cannot offer up or agree by contract to the very thing it claims is being taken. Otherwise, it is impossible to know how much was "taken" and how much was "given."

The holding is applicable to Greystone's failure to contest the *Development Agreement*. The factors at issue in *Williamson County* were the traditional federal regulatory takings tests, *e.g.*, "the effect [of the decision] on the value of respondent's property and investment-backed profit expectations." *Williamson County* at 200. The factors at issue here are state law considerations involving, notably, whether the payment is voluntary. In either case, a court is not in a position to evaluate the relevant factors when the plaintiff has not bothered to ask the local government for relief. In other words, Greystone should have raised its objections with the local government in a timely and meaningful way in order to set up its claim that the exaction is involuntary. Greystone did just the opposite. It proposed, executed, and carried out the *Development Agreement*. The District Court hit the nail on the head when it concluded:

> In this case, the Plaintiffs were required to raise their objections with the local government in a timely and meaningful way in order to set up their claim that the exaction was involuntary. In this case, the Plaintiffs proposed, executed and carried out a development agreement. Thus, the Court will find that there is no final decision as spelled out in *Williamson County*.

Memorandum Decision, R. Vol. II, p. 369.

Next, Greystone argues that the first prong of *Williamson County* does not apply because this is a physical taking case. With all due respect, it appears that Greystone does not understand what a physical taking is. When the government physically takes property through an exaction, that is analyzed as a regulatory taking, not a physical taking. These are well-defined terms of art in constitutional law.[33]

(2) Test 2: The requirement to employ state remedies.

Under the second prong of *Williamson County,* the property owner must "seek compensation through the procedures the State has provided for doing so" before litigating the federal claim. *Williamson County* at 194. "[I]f a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." *Williamson County* at 195. Idaho provides a means for challenging a taking (aka inverse condemnation) by seeking judicial review under LLUPA. Greystone failed to do so, and now it is too late. Accordingly, Greystone has forfeited its federal claim under prong two of *Williamson County*.

In *Pascoag Reservoir & Dam, LLC v. Rhode Island*, 337 F.3d 87 (1st Cir. 2003), the court rejected the plaintiff's argument that ripening the federal claim by first bringing a state

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[33] "The government effects a physical taking only where it requires the landowner to submit to the physical occupation of his land." *Yee v. City of Escondido*, 503 U.S. 519, 526 (1992) (emphasis supplied) (holding that a mobile home rent control statute did not affect a physical taking). No one requires a developer to apply for a permit. An exaction associated with a permit may be unlawful but, if it is, that is known as a regulatory taking. In *Lingle v. Chevron USA, Inc.*, 544 U.S. 528 (2005), the Court, again, drew a clear distinction between physical takings and exaction-based regulatory takings, even when the end result is that the government ends up with physical possession of the plaintiff's money or property: "In each case, the Court began with the premise that, had the government simply appropriated the easement in question, this would have been a *per se* physical taking. The question was whether the government could, without paying the compensation that would otherwise be required upon effecting such a taking, demand the easement as a condition for granting a development permit the government was entitled to deny. . . . *Nollan* and *Dolan* both involved dedications of property so onerous that, outside the exactions context, they would be deemed *per se* physical takings." *Lingle*, 544 U.S. at 546-47 (citing *Nollan v. California Coastal Commission*, 483 U.S. 825, 831-32 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994)). The distinction between physical and regulatory takings has been recognized by this Court as discussed in *Covington v. Jefferson County*, 137 Idaho 777, 781, 53 P.3d 828, 832 (2002) (citing *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002)).

takings claim would have been futile because the claim was barred by the statute of limitations. "Adequate remedies were available to Pascoag; it simply ignored those remedies until it was too late. By failing to bring a timely state cause of action, Pascoag forfeited its federal claim." *Pascoag*, 337 F.3d at 94. "[W]hile the *Williamson County* requirements typically reveal a claim to be premature, they may also reveal that a claim is barred from the federal forum. The *Williamson County* 'ripeness' requirements will never be met in this case, because the state statute of limitations has run on Pascoag's inverse condemnation claim. By failing to bring its state claim within the statute of limitations period, Pascoag *forfeited* its federal claim." *Pascoag*, 337 F.3d at 95 (citations omitted, emphasis original).

Greystone's brief misses the point. Greystone says it satisfied the second prong by bringing this very suit. *Appellants' Brief* at 30. If this suit had been properly and timely filed, that would be true. But it was not, and having failed to file a proper and timely inverse condemnation action (by seeking judicial review under LLUPA), Greystone's federal claim is unripe and can never be ripened. Instead, it is forfeited.

C. Greystone missed the two-year statute of limitations applicable to federal claims.

All § 1983 actions are subject to the state's statute of limitations for personal injury. *Wilson v. Garcia*, 471 U.S. 261, 266-67 (1985). On numerous occasions, Idaho courts have applied *Wilson* and held that Idaho's two-year statute of limitations (Idaho Code § 5-219(4)) applies, regardless of the nature of the § 1983 claim.[34]

Greystone implausibly believes this does not apply to it. "Since Greystone is not

[34] *McCabe v. Craven,* 145 Idaho 954, 957, 188 P.3d 896, 899 (2008); *Osborn v. Salinas*, 131 Idaho 456, 458, 958 P.2d 1142, 1144 (1998); *Idaho State Bar v. Tway*, 128 Idaho 794, 798, 919 P.2d 323, 327 (1996); *Mason v. Tucker and Assoc.,* 125 Idaho 429, 436, 871 P.2d 846, 853 (Ct. App. 1994); *Herrera v. Conner,* 111 Idaho 1012, 1016, 729 P.2d 1075, 1079 (Ct. App. 1987); *Henderson v. State*, 110 Idaho 308, 310-11, 715 P.2d 978, 980-81 (1986).

required to proceed under Section 1983, the two year statute of limitations of Idaho Code section 5-219 is not applicable to its federal inverse condemnation claim." *Appellants' Brief* at 28-29. Greystone's entire federal case rests on this premise, for which it cites not a single authority. There is, however, ample and consistent authority to the contrary. The law is clear that *Bivens* actions (those brought independent of § 1983) are subject to the same state statute of limitations for personal injury as are § 1983 claims.[35] Thus, even if this Court declined to follow *Azul-Pacifico* and found that there is a direct cause of action under the Constitution, the federal claims would nevertheless be subject to Idaho's two-year statute of limitations. *Bieneman* is directly on point, because this Seventh Circuit decision assumed that *First English* allowed for takings challenges directly under the Constitution, and found them nevertheless subject to the same state statute of limitations as dictated for § 1983 cases in *Wilson*. *Bieneman*, 864 F.2d at 468.

This Court has not had occasion to address this question. However, these federal precedents are definitive because the question is controlled by federal law. Federal law dictates which statute of limitations is applicable to federal claims and when that statute will begin to run. *Wallace v. Kato*, 549 U.S. 384, 387-88 (2007); *McCabe v. Craven,* 145 Idaho 954, 957, 188 P.3d 896, 899 (2008).

VIII. THE CITY IS ENTITLED TO RECOVER ITS ATTORNEY FEES

The City seeks attorney fees under both Idaho Code § 12-117 and Idaho Code § 12-121. There is a line of authority, including very recent cases, holding that if section 12-117 is

[35] Virtually every court in the nation, including those of the Ninth Circuit, have held that *Bivens* actions are subject to the same state statute of limitations for personal injury as are § 1983. *Bieneman v. City of Chicago*, 864 F.2d 463, 469 (7th Cir. 1988), *cert. denied*, 490 U.S. 1080 (1989) (direct takings claim subject to two-year statute); *Van Strum v. Lawn*, 940 F.2d 406 (9th Cir. 1991) (applying *Bieneman* in Ninth Circuit in non-takings case); *Chin v. Bowen*, 833 F.2d 21 (2nd Cir. 1987) (action brought directly under 14th Amendment); *S.W. Daniel, Inc. v. Urrea*, 715 F. Supp. 1082, 1085 (N.D. Ga. 1989) ("The court therefore concludes, as has virtually every appellate court addressing the issue, that the teachings of *Wilson* should be applied to *Bivens* actions as well.") (footnote citations omitted); *McSurely v. Hutchinson*, 823 F.2d 1002 (6th Cir.1987), *cert. denied*, 485 U.S. 934 (1988).

available, it is exclusive. *E.g.*, *Kepler-Fleenor v. Fremont County*, 152 Idaho 207, 213, 268 P.3d 1159, 1165 (2012). On other occasions, the Court has applied both sections 12-117 and 12-121.[36] To our knowledge, these cases have not been expressly overturned. Accordingly, to be on the safe side, the City seeks fees under both provisions.

As set forth in the *City's Memorandum of Costs and Attorney Fees with Supporting Statement*, R. Vol. III, p. 478 (supported by the *Affidavit of Christopher H. Meyer*, R. Vol. III, p. 453), the City claimed attorney fees incurred in its defense of this action in the total amount of $82,023. The District Court denied the City's request for its attorney fees concluding that Greystone did not pursue this case without a reasonable basis in fact or law because "[t]his case presented a number of challenging legal issues regarding which statute of limitations applied, when the cause of action accrued, and whether the Plaintiffs failed to exhaust their remedies as set out in the case of *KMST, LLC v. County of Ada*, 138 Idaho 577 (2003)." R. Vol. IV, p. 636.

Following Greystone's appeal of the judgment in the City's favor, the City cross-appealed the decision to deny the City's request for attorney fees. In addition, pursuant to Idaho App. R. 41(a), the City claims a right to recover its attorney fees incurred during this appeal. Both the claim to attorney fees below and the claim to fees before this Court are governed by the same standards. Therefore, the following arguments and authorities apply to the City's right to recover the fees it has incurred in the trial court and on appeal.

Under section 12-117, parties in actions involving a state agency or local government may recover their costs and attorney fees if they prevail and can show that the other party acted

[36] *E.g.*, *Total Success Investments, LLC v. Ada County Highway Dist.* ("*Total Success II*"), 148 Idaho 688, 695, 227 P.3d 942, 949 (Ct. App. 2010); *Ada County Highway Dist. v. Total Success Investments, LLC* ("*Total Success I*"), 145 Idaho 360, 372, 179 P.3d 323, 335 (2008).

"without a reasonable basis in fact or law."[37] Idaho Code § 12-121, as modified by Idaho R. Civ. P. 54(e)(1), authorizes recovery in cases that are "brought, pursued or defended frivolously, unreasonably or without foundation."

While the standards under section 12-117 and 12-121 read differently, this Court has equated the two standards.[38] Accordingly, the arguments below showing that Greystone's actions were "without a reasonable basis in fact or law" should be understood to apply equally to the standards under both 12-117 and 12-121.

This case satisfies the threshold requirements in section 12-117: the case is a civil action involving a governmental entity and private entities as adverse parties, and the City prevailed. All that remains is to establish that Greystone pursued the matter "without a reasonable basis in fact or law" or, under section 12-121, that Greystone brought or pursued this case "frivolously, unreasonably or without foundation."

The Idaho Supreme Court has often described the public policy served by awards of attorney fee awards in deterring baseless litigation. *E.g.*, *Reardon v. Magic Valley Sand and Gravel, Inc.*, 140 Idaho 115, 118, 90 P.3d 340, 343 (2004). The need for deterrence is particularly evident here. The City has endured a costly and unnecessary legal challenge that

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[37] This statute was amended in 2010, 2010 Idaho Sess. Laws ch. 29, to change the result obtained in *Rammell v. ISDA*, 147 Idaho 415, 210 P.3d 523 (2009). The amendment affects only the type of proceedings in which attorney fees are awarded, not the applicable standard. Accordingly, prior precedent remains valid. Subsequent decisions interpreting the 2010 amendment (*e.g.*, *Laughy v. Idaho Dep't of Transportation*, 149 Idaho 867, 876-77, 243 P.3d 1055, 1064-65 (2010); *Smith v. Washington County*, 150 Idaho 388, 392, 247 P.3d 615, 619 (2010) (replacing earlier opinion) have held that the amendment bars recovery in judicial review proceedings. However, that has no bearing on this matter, which is a civil action.

[38] *Total Success Investments, LLC v. Ada County Highway Dist.* ("*Total Success II*"), 148 Idaho 688, 695, 227 P.3d 942, 949 (Ct. App. 2010); *Ada County Highway Dist. v. Total Success Investments, LLC* ("*Total Success I*"), 145 Idaho 360, 372, 179 P.3d 323, 335 (2008); *Jenkins v. Barsalou*, 145 Idaho 202, 207, 177 P.3d 949, 954 (2008); *Nation v. State, Dep't of Correction*, 144 Idaho 177, 194, 158 P.3d 953, 970 (2007). The only difference between the statutes is that section 12-121 entails an exercise of discretion. Consequently, on appeal, the reviewing court reviews section 12-121 claims under an abuse of discretion standard. In contrast, appellate courts freely review section 12-117 claims. *Total Success II*, 148 Idaho at 695, 227 P.3d at 949.

should not have been brought in the first instance. The law was clear from the outset that Greystone had no viable cause of action, and this was made plain to Greystone by the City early in the litigation. Letter to Greystone, R. Vol. III, pp. 499-501.

It bears emphasis that, unlike other attorney fee provisions, section 12-117 does not entail an exercise of discretion. This Court has stated on numerous occasions that, where the requirements of the statute are met, an award of attorney fees is mandatory. *E.g.*, *Rincover v. State of Idaho, Dep't of Finance*, 132 Idaho 547, 549, 976 P.2d 473, 475 (1999); *Fischer v. City of Ketchum*, 141 Idaho 349, 356, 109 P.3d 1091, 1098 (2005).

Where parties ignore settled precedent, as Greystone did here, they are subject to a mandatory award of fees under section 12-117. This Court has ruled that failure to address controlling appellate decisions and failure to address factual or legal findings of the district court equates to pursuing litigation without a reasonable basis in fact or law. *Waller v. State of Idaho, Dep't of Health and Welfare*, 146 Idaho 234, 240, 192 P.3d 1058, 1064 (2008). Other examples of parties paying the price for ignoring settled precedent are found in *Excell Construction, Inc. v. Idaho Dep't of Commerce and Labor*, 145 Idaho 783, 793, 186 P.3d 639, 649 (2008) (attorney fees awarded against agency that failed to apply a case whose relevant facts were "virtually indistinguishable"), and *Gallagher v. State*, 141 Idaho 665, 669, 115 P.3d 756, 760 (2005) (attorney fees may be awarded when "the law is well-settled"). The same holds true under section 12-121. "Attorney fees are awardable if an appeal does no more than simply invite an appellate court to second-guess the trial court on conflicting evidence, or if the law is well settled and appellant has made no substantial showing that the district court misapplied the law." *Johnson v. Edward*, 113 Idaho 660, 662, 747 P.2d 69, 71 (1987).

Greystone finds itself in a position similar to that of the non-prevailing parties in the

cases just cited. Like those parties, Greystone failed to address key facts and controlling legal precedent. As discussed above, Greystone's claims are barred in numerous ways: exclusivity of judicial review, federal and state statutes of limitations, ITCA's notice of claim requirement, exhaustion, voluntariness, failure to plead § 1983, *Williamson County*, and equitable considerations. It was unreasonable for Greystone to press this litigation in the face of so many strong defenses. If one did not take it down, another would. As a result, the standards for an award of attorney fees to the City are met here.

CONCLUSION

For all these reasons, the Court should affirm the District Court's dismissal of this suit and award attorney fees to the City.

Respectfully submitted this 18th day of May, 2012.

GIVENS PURSLEY LLP

By _____
Christopher H. Meyer

By _____
Martin C. Hendrickson

Attorneys for City of McCall

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 18th day of May, 2012, the foregoing was served as follows:

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_____
Christopher H. Meyer

EXHIBIT A:

TIMETABLE OF KEY DOCUMENTS AND EVENTS

Date of filing or action	Author or Actor	Description of Document or Event	Location in Record
1/12/2005	Greystone	*Subdivision Application - Preliminary Application to Plat.*	Groenevelt Aff., Exh. A.
5/3/2005	McCall P&Z	Meeting minutes.	Groenevelt Aff., Exh. B.
5/9/2005	McCall P&Z	Findings and Conclusions for SUB-05-4 (preliminary plat final approval).	Groenevelt Aff., Exh. C.
5/9/2005	McCall P&Z	Findings and Conclusions for PUD-05-2 (recommended approval of PUD general development plan).	Groenevelt Aff., Exh. D.
6/23/2005	City Council	*Findings and Conclusions Regarding Applications for Planned Unit Development General Development Plan (PUD-05-2 Greystone Village).*	Groenevelt Aff., Exh. E.
2/23/2006	City Council	Ordinance 819 ("Inclusionary Zoning").	Groenevelt Aff., Exh. F.
2/23/2006	City Council	Ordinance 820 ("Community Housing Fee").	Groenevelt Aff., Exh. G.
3/20/2006	Greystone (by Briggs Engineering)	Letter application for final plat and final plan. This letter application was accompanied by two form applications (for final plat and final plan).	Motion for Leave to Supplement, Exh. 1, R. Vol. II, pp. 354-57.
3/20/2006	Greystone	*Planned Unit Development (PUD) Final Plan Application.* (This form application begins on page 4. Prior pages are instructions. The corresponding form application for final plat was inadvertently omitted from the record.)	Groenevelt Aff., Exh. H.
4/4/2006	McCall P&Z	Meeting Minutes - final plat and final plan approved.	Groenevelt Aff., Exh. I.
4/4/2006	McCall P&Z	Findings and Conclusions for SUB-05-4 (recommended approval of final plat).	Groenevelt Aff., Exh. J.
4/4/2006	McCall P&Z	Findings and Conclusions for PUD-05-2 (recommended approval of final plan).	Groenevelt Aff., Exh. K.
4/7/2006	Greystone (by David Penny)	Letter to Michelle Groenevelt regarding satisfaction of City's requirement for affordable housing.	Groenevelt Aff., Exh. L.
4/10/2006	Greystone (by Clearwater Appraisal, Inc.)	Appraisal for the nine lots to be used for affordable housing.	Groenevelt Aff., Exh. M.
4/20/2006	City (by Michelle Groenevelt)	Fax to Steve Benad forwarding revised Article VII, 7.2 from the *Development Agreement.*	Groenevelt Aff., Exh. N.

4/27/2006	City	McCall City Council Meeting Minutes. Voted to approve final plat (SUB) and final plan (PUD). Also voted to approve *Development Agreement*.	Groenevelt Aff, Exh. O; Answer, Exh. D, R. Vol. I, pp. 80-84.
4/27/2006	City	*Findings and Conclusions Regarding Application for Final Plat Approval (SUB-05-4 Greystone Village Phase 1, 2 & 3).*	Groenevelt Aff., Exh. P;Answer, Exh. B, R. Vol. I, pp. 42-50.
4/27/2006	City	*Findings and Conclusions Regarding Application for Final Plat [sic: Plan] Approval (PUD-05-2 Greystone Village Phase 1, 2 & 3).*	Groenevelt Aff., Exh. Q; Answer, Exh. A, R. Vol. I, pp. 32-40.
5/3/2006	City	*Development Agreement.*	Groenevelt Aff., Exh. R; Answer, Exh. D, R. Vol. I, pp. 86-130. (Exhibit inadvertently includes redundant copies of SUB-05-4 and PUD-05-2 approvals.)
7/16/2006	DEADLINE	4 years prior to Complaint.	
7/31/2006	City	Warranty Deed from Greystone Village, LLC conveying lots to City of McCall.	Groenevelt Aff., Exh. S.
9/22/2006	Mountain Central Bd. of Realtors	*Mountain Central* lawsuit filed challenging Ordinances 819 and 820.	*See*, Groenevelt Aff., Exh. U.
10/12/2006	Greystone and City	News article describes ground breaking for construction of affordable housing on the nine lots provided by Greystone. Photographs show Greystone developers Steve Benad and Richard Hehr participating in the ground breaking.	Groenevelt Aff., Exh. T.
10/19/2006	Steve Hassen (City staff)	Internal staff memo discussing implementation of Ordinance Nos. 827 (moratorium) and 828 (exemption from moratorium).	R. Vol. III, p. 442.
7/26/2007	City (by Roger Millar)	Internal email communication between Roger Millar and Michelle Groenevelt discussing an inquiry from Richard Hehr as to whether Greystone is required to perform road and utility improvements on the nine lots.	R. Vol. II, p. 385.
2/19/2008	District Court	Decision in *Mountain Central* case invalidating Ordinance Nos. 819 and 820.	Groenevelt Aff., Exh. U.
4/24/2008	City Council	Ordinance No. 856 (repealing Ordinance Nos. 819 & 820).	Groenevelt Aff., Exh. V.
4/24/2008	City Council	Resolution 08-11 (authorizing refunds of fees collected under Ordinance No. 820).	Groenevelt Aff., Exh. W.
7/16/2008	DEADLINE	2 years prior to Complaint.	

11/4/2009	City Council	Resolution 09-10 (setting 12-31-2009 deadline for refunds of fees paid under Ordinance No. 820).	Groenevelt Aff., Exh. X.
11/25/2009	Greystone (by Richard Hehr)	*Refund Request Form* requesting refund of $1,340,000. Dated 11-12-2009, but stamped "received" on 12-25-2009.	Groenevelt Aff., Exh. Y.
1/27/2010	City (by William F. Nichols)	Letter to counsel for Greystone regarding refund request.	Groenevelt Aff., Exh. Z.
7/15/2010	Greystone	*Complaint.*	R. Vol. I, pp. 1-5.
7/16/2010	Greystone	*First Amended Complaint.*	R. Vol. I, pp. 6-10.
8/31/2010	City	*Answer to First Amended Complaint and Counterclaim.*	R. Vol. I, pp. 11-130.
10/12/2010	Greystone	*Reply to Counterclaim.*	R. Vol. I, pp. 131-35.
4/5/2011	City	*City's Motion for Summary Judgment.*	R. Vol. I, pp. 143-45
4/15/2011	City (by Christopher H. Meyer)	Letter to counsel for Greystone offering settlement.	Memo of Costs & Fees, Exh. A, R. Vol. III, pp. 499-501.
6/16/2011	District Court	*Memorandum Decision on Defendant's Motion for Summary Judgment.*	R. Vol. II, pp. 361-72.
6/29/2011	Greystone	*Motion for Reconsideration and Objection to Proposed Judgment.*	R. Vol. II, pp. 373-74.s
10/18/2011	District Court	*Memorandum Decision (1) Plaintiffs' Motion for Reconsideration (2) Defendant's Motion for Attorneys Fees and Costs.*	R. Vol. IV, pp. 630-37.
11/22/2011	District Court	*Judgment.*	R. Vol. IV, pp. 638-40, 641-43 (duplicate).

EXHIBIT B:

MCCALL ZONING ORDINANCE § 3.10.12 (MAR. 16, 2006)

3.10.12: AMENDMENTS TO FINAL DEVELOPMENT PLAN:

(A) Subsequent Amendments:

1. Any subsequent amendment to the final development plan changing location, siting, and height of buildings and structures may be authorized by the commission, without additional public hearings, if required by engineering or other circumstances not foreseen at the time the final plan was approved.

2. In no case shall the commission authorize changes which may cause any of the following:

   (a) A change in the use or character of the development, including ownership.

   (b) An increase in overall coverage of structures or significant changes in types of structures.

   (c) An increase of the intensity of use or types of usage.

   (d) An increase in the problems of traffic circulation and public utilities.

   (e) A reduction of off street parking and loading space.

   (f) A reduction in required pavement widths.

(B) Change Requiring Public Hearing: All other changes in use, rearrangement of lots, blocks and building tracts, or in the provision of common open spaces and changes in addition to those listed above which constitute substantial alteration of the original plan shall require a public hearing before the commission and approval by the council.

(C) Expiration:

1. On the anniversary year after general development plan and program approval, until the project is complete, the applicants or applicants' successors, shall file a progress report. If substantial construction or development has not taken place within four (4) years from the date of approval of the general development plan and program, the commission shall review the PUD program at a public hearing to determine whether or not its continuation, in whole or in part, is in the public interest, and, if found not to be, shall recommend to the council that the PUD approval be revoked.

2. After action by the commission, the council shall consider the matter and by resolution accept or reject it or return it to the commission for further action. Notice and hearing shall be provided according to the same procedures as are then applicable to a new application, with the present owner of the property being sent notice by certified mail, return receipt requested; the city is entitled to rely on the county tax assessor's records

and a title company title search for the name and address of the current owner(s). (Ord. 821, 2-23-2006, eff. 3-16-2006)

EXHIBIT C:

MCCALL SUBDIVISION ORDINANCE §§ 3-21-250 TO 3-21-260 (MAR. 24, 1994)

3-21-240: **EASEMENTS:**

(A) Easements shall be provided for utilities inside the front lot line of a width of a minimum of twelve feet (12'), subject to the right of access, and elsewhere as and where considered necessary by the utilities and approved by the Commission.

(B) Where a subdivision is traversed by a watercourse, drainage way, channel or stream there shall be provided a storm water easement or drainage right of way conforming substantially with the lines of such watercourse, and such further width or construction, or both, as will be adequate for the purpose. The Commission may require setbacks from watercourses, applicable not only to buildings, but also to any disturbance of the stream banks and edge habitats.

(C) Provisions for adequate drainage shall be made by the subdivider as prescribed by the Director of Public Works in accordance with the manual containing the road standards and specification as adopted by the City of McCall. (Ord. 615, 3-24-94)

3-21-250: **STREET AND UTILITY IMPROVEMENT REQUIREMENTS:**

(A) Street, utility and other on-site and off-site improvements, as hereinafter listed, shall be installed in each new subdivision at the subdivider's expense, or their later installation at subdivider's expense provided for in the subdivision agreement, in accordance with the minimum standards set forth below prior to the acceptance of any final plat filing.

(B) Neither the Board nor the City shall accept the dedication of any public rights of way and any easements shown on the plat, together with appurtenant facilities lying therein which it would have a duty to maintain after dedication, which are not improved, or construction thereof guaranteed in accordance with the provisions of this Title or with policies, standards, designs and specifications set forth in the road, street specifications adopted by the City and, with respect to the impact area, by the County.

(C) Street name signs must be placed at all intersections per City standards, and street lighting at intersections with arterial streets and within industrial and commercial zoning districts. (Ord. 615, 3-24-94)

3-21-260: **REQUIRED STREET, UTILITY AND OFF-STREET IMPROVEMENTS:** Improvements are required as follows: the decision of the City official having jurisdiction made in good faith shall control all questions of interpretation of standards; provided that the County Engineer shall be consulted as well in matters affecting the impact area. This Section and the Valley County road standards shall be read together with reference to the impact area, with the stricter standard to control in the presence of any conflict. "Stricter", in this sense, shall mean whichever standard would as applied create the more durable and more maintainable road, for example the wider road section, rather than the narrower, and the material less susceptible to water wicking, as opposed to more susceptible. (Ord. 670, 6-29-1995)

(A) Required Improvements In Subdivisions: The subdivider shall plan, and construct in residential, commercial, or industrial subdivisions:

1. Paved streets; except that paving within the impact area is required only when:

(a) Paving would be required by the County in a like location, as determined by the County Engineer, or

(b) The land being subdivided is in whole or pertinent part within that area identified as to be annexed to the City by the then current Comprehensive Plan, or

(c) In the opinion of the City Engineer applicable Federal or State air or water pollution control requirements mandate or soon will mandate paving.

2. Appropriate natural, storm, and meltwater drainage and treatment facilities, to include provisions for natural, storm and meltwater drainage and treatment within street rights of way and other drainages on and through the property, consistent with best management practices under State and Federal storm and meltwater regulatory programs to which the City is subject, and consistent with other City plans in these regards, all as established to the satisfaction of the City Engineer. Off-site improvements necessary for interconnection may be required of the developer as a condition upon plat approval, or platting and development shall be postponed until such improvements are provided by others. Nothing in this Title shall ever be construed to require the City to expend public funds not budgeted and appropriated for the purpose.

3. Water and sewer lines; except that installation of water or sewer lines, either or both, may be waived under circumstances where applicable State health and environmental requirements and Title VI of this Code, do not require the same; provided, however, that the Commission may nevertheless require the installation of dry water or sewer lines when the land being subdivided is in whole or pertinent part within that area identified as to be annexed to the City by the then current Comprehensive Plan, or is shown as to be provided with water or sewer, or both, as the case may be, in adopted water or sewer master plans.

4. Underground power and telephone.

5. Street lights at intersections with collector or arterial streets as determined in good faith by the Administrator.

6. Underground cable television service, except where waived by the Administrator because the property is too remote from existing service and planned expansions of service.

7. Paved bicycle paths where shown on an approved park or path plan of the planning jurisdiction or relevant part thereof, and additionally as needed for use for access to and from and within such subdivision; and such other provisions for designation and signing of pedestrian and bicycle routes as the Commission deems appropriate for the subdivision.

8. Sidewalks where within Zones GC or C, either separated by landscaped drainage from the street, or with rolled curb and gutter; and sidewalks, curb and gutter, where within Zone CB.

9. Groundcover, landscaping, and irrigation within common areas, street dedications, and other dedications, where natural vegetation was excavated, covered, or otherwise disturbed during construction, to include also fill and cut slopes; homeowners' associations where formed shall be responsible for maintenance of vegetation within common areas, street dedications, and other dedications, to the extent not performed by the owner of abutting improvements. Vegetation within drainageways shall be designed to improve appearance, hold down dust, and to cleanse, but not obstruct drainage, consistent with best management practices outlined in State and Federal storm and meltwater programs to which the City is subject, and consistent with other City programs in these regards, all

as established to the satisfaction of the City Engineer. (Ord. 712, 6-26-1997[1])

(B) Alleys: Within commercial and industrial subdivisions the subdivider shall also provide paved alleys, except where alleys are omitted from the plat with approval of the Commission.

(C) Plan Approval And Inspection: Design plans for street construction and subdivision drainage shall be submitted to and approved by the City Public Works Director prior to construction. Subgrade construction must be approved before placing gravel fill and gravel fill inspected before placing base course. For lands in the impact area, submittal is also to, and approval is from, the County Engineer.

(D) Clearance: The right of way beyond the limits of fill and back slopes shall be cleared to the extent and not beyond the extent required by the City Engineer upon request of the subdivider for direction, having regard to the safety of the traveling public and the appearance of the City. (Ord. 615, 3-24-1995)

(E) Materials Standards And Construction: The then latest edition of the ISPWC standards and materials specifications shall govern materials used in the streets and their placement. Subgrade embankment shall be placed in uniform layers not exceeding eight inches (8") thick each, and shall be compacted. The top twelve inches (12") of subgrade shall be compacted to not less than ninety percent (90%) density by scarifying, watering, and rolling as required. (Ord. 670, 6-29-1995)

(F) Drainage: Drainage must be provided:

1. Storm sewer shall be employed where a connection to appropriately sized storm sewer facilities within three hundred feet (300') is possible.

2. Surface drainage may be provided where storm sewer is not present, according to the following standards, except where flowing water is generally present, standards shall be as directed by the

1. This Ordinance shall be in full force and effect within the Area of City Impact from and after the later of its passage, approval and publication as required by law by the City, or the passage, approval and publication as required by law of an ordinance of the County applying this Ordinance to the Area of City Impact.

Public Works Director with an eye to both high water and risks of winter glaciation:

(a) Street side ditches shall drain to cross-drains; the size of both are subject to approval of the Public Works Director.

(b) Cross-drains at intersections shall be set back ten feet (10') from the property line or located as approved by the Public Works Director.

(c) Driveway approach culverts shall be not less than twelve inches (12") in diameter.

(G) Street Grade: The maximum permitted grade is six percent (6%); grades of up to ten percent (10%) may be permitted where the Public Works Director and the Fire Chief are satisfied by reason of site topography and soils that a reasonable lesser-grade alternative does not exist. No street may be artificially elevated over an underpass location merely to permit a private underpass.

(H) Standard Streets: The standard street is centered on the center line of the right of way; constructed in accord with the above standards as to materials and drainage, and meets the standards set out in the following standard profiles and referenced sources, all of which together may be referred to as the City of McCall Standard Specifications: